

87 1132 ①

No.

Supreme Court, U.S.
FILED

JAN 5 1988

JOSEPH F. SPANOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118 AND THE TOLEDO TRUST COM-
PANY, AS TRUSTEE OF TRUST NO. 4117,

Petitioners,

vs.

SANTA BARBARA FOUNDATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Ohio Supreme Court

E. THOMAS MAGUIRE

Counsel of Record

MICHAEL S. MESSENGER

ROBISON, CURPHEY & O'CONNELL

Four SeaGate, 9th Floor

Toledo, Ohio 43604

(419) 249-7900

*Attorneys for Petitioner The
Toledo Trust Company, as
Trustee of Trust No. 4118*

DONALD F. MELHORN, JR.

Counsel of Record

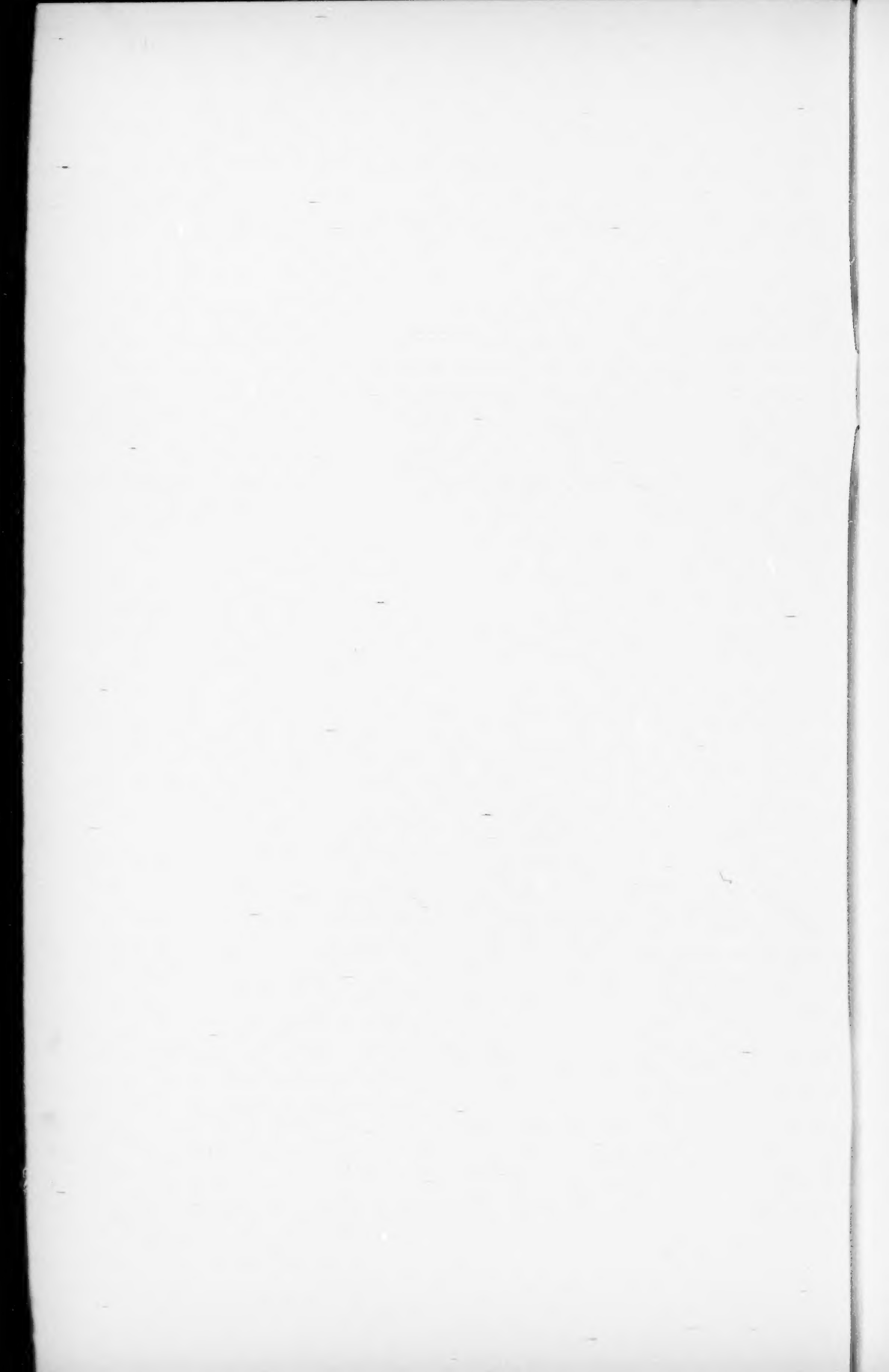
MARSHALL & MELHORN

Four SeaGate, 8th Floor

Toledo, Ohio 43604

(419) 249-7100

*Attorney for Petitioner The
Toledo Trust Company, as
Trustee of Trust No. 4117*



QUESTION PRESENTED

Whether petitioners, who are, respectively, an Ohio beneficiary claimant of trust property, and the Ohio trustee holding and administering such property, were denied due process of law by a judgment of the Ohio Supreme Court giving preclusive effect, as a matter of full faith and credit, to an order of a California court awarding the property and directing its distribution to another claimant, in a proceeding in which petitioners did not appear, and in which jurisdiction over them was asserted by mere notice of such proceeding?

LIST OF PARTIES TO PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The parties to this proceeding in the Supreme Court of Ohio were:

The Toledo Trust Company,¹
as Trustee of Trust No. 4117, *Petitioner*

The Toledo Trust Company,¹
as Trustee of Trust No. 4118, *Petitioner*

Santa Barbara Foundation, *Respondent*

The Honorable Anthony J. Celebrezze, Jr.
Attorney General for the State of Ohio²

Alcoholics Anonymous, Central Office
Santa Barbara, California³

Nancy S. Jones⁴

1. The Toledo Trust Company is a wholly owned subsidiary of Trustcorp, Inc., an Ohio corporation. Other Trustcorp, Inc. subsidiaries, all wholly owned, are Trustcorp Company, N.A., St. Joseph Bancorporation, Inc., First Bancshares of Huntington, Inc., SeaGate Capital Management Company, SeaGate Community Development Corporation, SeaGate Corporation, SeaGate Venture Management, Inc., and Trustcorp of Florida, N.A.

2. The Honorable Anthony J. Celebrezze, Jr., Attorney General for the State of Ohio was made a party pursuant to Ohio Revised Code §109.25, under which said Attorney General is a necessary party to all judicial proceedings involving the application of the doctrine of *cy pres*. The Attorney General has not participated on the merits below.

3. Alcoholics Anonymous has not participated below.

4. Nancy S. Jones, settlor of Trust No. 4117 the distribution of the assets of which is the subject of this litigation, is represented by counsel for The Toledo Trust Company, as Trustee of Trust No. 4118, and has elected to assert no claim of entitlement to distribution of the fund.

III

TABLE OF CONTENTS

QUESTION PRESENTED	I
LIST OF PARTIES TO PROCEEDINGS BELOW AND RULE 28.1 STATEMENT	II
TABLE OF AUTHORITIES	V
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
HOW FEDERAL QUESTION WAS RAISED AND PASSED UPON BELOW	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I. The Ohio Supreme Court Effectively Ignored This Court's Ruling in <i>Hanson v. Denckla</i>	8
II. The California Court Lacked Any Basis Con- sistent With Due Process for Jurisdiction Over Petitioners	9
III. The Ohio Supreme Court's Ruling Has Wide- spread Application to, and Disruptive Effect on Trust Litigation	14
CONCLUSION	17
APPENDIX (separately bound):	
Opinion of the Supreme Court of Ohio, August 26, 1987	A1
Decision and Journal Entry of the Court of Appeals of Lucas County, Ohio, May 9, 1986	A13
Supplemental Decision and Orders of the Court of Appeals of Lucas County, Ohio, May 21, 1986	A22

IV

Opinion and Judgment Entry of the Court of Common Pleas of Lucas County, Ohio, July 29, 1985	A24
Order of the Court of Common Pleas of Lucas County, Ohio Enforcing Mandate, November 19, 1987	A30
Judgment Entry of the Supreme Court of Ohio, August 26, 1987	A32
Mandate of the Supreme Court of Ohio, August 26, 1987	A33
Entry of the Supreme Court of Ohio Denying Re- hearing, October 7, 1987	A34
Complaint Filed in the Court of Common Pleas of Lucas County, Ohio, November 3, 1983	A35
Answer of Santa Barbara Foundation Filed in the Court of Common Pleas of Lucas County, Ohio	A38
Answer of Trust No. 4118 Filed in the Court of Common Pleas of Lucas County, Ohio	A41
Stipulations and Attached Exhibits Filed in the Court of Common Pleas of Lucas County, Ohio, April 24, 1985	A43
Exh. A. Trust Agreement	A48
Exh. B. Will of Marcia MacDonald Rivas	A67
Exh. C. Declaration of Declination - Alcoholics Anonymous	A74
Exh. D. Petition for Determination of Entitle- ment to Distribution of Estate - Santa Bar- bara Foundation	A76
Exh. E. Notice of Hearing (Probate)	A86
Exh. F. Order Determining Entitlement to Dis- tribution of Estate	A96
Exh. G. Articles of Incorporation, Santa Bar- bara Foundation	A101
California Probate Code, §1200.5	A106

TABLE OF AUTHORITIES

Cases

<i>Asahi Metal Industry Co. v. Superior Court of California, Solano County</i> , 480 U.S., 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987)	12
<i>Baker v. Baker, Eccles & Co.</i> , 242 U.S. 394 (1917)	11
<i>Blount v. Walker</i> , 134 U.S. 607 (1890)	10
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	12
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958)8, 9, 10, 11, 13, 15	
<i>Henry L. Doherty & Co. v. Goodman</i> , 294 U.S. 623 (1935)	12
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	12
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984)	12
<i>Kulko v. Superior Court of California</i> , 436 U.S. 84 (1978)	11
<i>Miller v. Davis</i> , 507 F.2d 308 (6th Cir., 1974)	13
<i>Milliken v. Meyer</i> , 311 U.S. 457 (1940)	11
<i>In re: Morgan Guaranty Trust Co.</i> , 28 N.Y.2d 155, 269 N.E.3d 571 (1971)	13
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	15
<i>Pennoyer v. Neff</i> , 95 U.S. 714 (1878)	11
<i>Princess Lida of Thurn and Taxis v. Thompson</i> , 305 U.S. 456 (1939)	16
<i>Riley v. New York Trust Co.</i> , 315 U.S. 343 (1942) ..	11

VI

<i>State Farm Fire & Casualty Co. v. Tashire</i> , 386 U.S. 523 (1967)	15
<i>Toledo Trust Co. v. National Bank of Detroit</i> , 50 Ohio App. 2d 147, 362 N.E.2d 273 (Lucas County Ct. App., 1976)	14
<i>Underwriters National Assurance Co. v. North Carolina Life Guaranty Ass'n.</i> , 455 U.S. 691 (1982)	15
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	12

Constitution and Statutes

U.S. Constitution, Article IV, §1	2, 3
U.S. Constitution, Fourteenth Amendment	2, 3, 8, 11, 16
28 U.S.C. §1335	15
28 U.S.C. §1397	16
28 U.S.C. §1738	3
28 U.S.C. §2361	16
California Probate Code, §1200.5	3, 6

Miscellaneous

Scoles and Hay, <i>Conflict of Laws</i> , 255 (1984)	16
5 Scott, <i>Trusts</i> §571 (3d ed., 1967)	13
Scott, <i>Hanson v. Denckla</i> , 72 Harv. L. Rev. 695 (1959)	14

No. _____

In the Supreme Court of the United States

October Term, 1987

— **THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118 AND THE TOLEDO TRUST COM-
PANY, AS TRUSTEE OF TRUST NO. 4117,**

Petitioners,

vs.

SANTA BARBARA FOUNDATION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
To the Ohio Supreme Court**

Petitioners, The Toledo Trust Company, as Trustee of Trust No. 4118 and The Toledo Trust Company, as Trustee of Trust No. 4117, respectfully request that a Writ of Certiorari issue to review the judgment and decision of the Ohio Supreme Court entered on August 26, 1987.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 32 Ohio St. 3d 141, 512 N.E.2d 664. The Lucas County Court of Appeals Decision and Journal Entry of May 9, 1986 is unreported and is reproduced in the Appendix at A13 through A21. The Lucas County Court of Appeals Decision and Journal Entry of May 21, 1986 is unreported

and is reproduced in the Appendix at A22. The Lucas County Court of Common Pleas Opinion and Judgment Entry of July 29, 1985 is unreported and is reproduced in the Appendix at A24 through A29. The Lucas County Court of Common Pleas Order of November 19, 1987 is unreported and is reproduced in the Appendix at A30.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on August 26, 1987. A timely motion for rehearing was denied on October 7, 1987. A34. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the application of the following constitutional provisions and statutes:

1. U.S. Constitution, Article IV, Section 1 provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

2. U.S. Constitution, Fourteenth Amendment provides, in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 U.S.C. §1738 provides, in pertinent part:

. . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

4. California Probate Code §1200.5 appears in the Appendix at A106.

HOW FEDERAL QUESTION WAS RAISED AND PASSED UPON BELOW

1. In their memoranda in support of their respective Motions for Summary Judgment in the trial court, Petitioner The Toledo Trust Company, as Trustee of Trust No. 4118 and Respondent Santa Barbara Foundation urged acceptance of their diverging views as to whether the Ohio court was required, under Article IV, Section 1 of the U.S. Constitution and 28 U.S.C. §1738, to give preclusive effect to the California Probate Court's order determining entitlement of the trust assets, or whether the California judgment was not so entitled because that Court lacked personal jurisdiction as required under the due process clause of the Fourteenth Amendment to the U.S. Consti-

tution. The trial court held that Trust No. 4118 was entitled to the funds on state property law grounds, a threshold issue by its characterization, and the federal constitutional issues were not passed upon by it. A28.

2. The claimants again asserted their respective positions as to the constitutional issues in the Lucas County Court of Appeals, and again the Court of Appeals decided the case on a state property law ground, the federal constitutional issues again not being reached. A16.

3. The claimants in the Ohio Supreme Court again renewed their constitutional claims with respect to whether full faith and credit need be accorded the California decision. The Ohio Supreme Court decided the constitutional issue as follows:

It is our conclusion, therefore, that the determination of the intent of a donee in exercising a testamentary special power of appointment by a court of competent jurisdiction of the state within which the donee is domiciled at the time of the power's exercise is binding in any subsequent judicial proceedings in Ohio and entitled to full faith and credit with respect thereto. A9.

Petitioner The Toledo Trust Company, as Trustee of Trust No. 4118 asserted its complaint of denial of due process by reason of the Ohio Supreme Court's judgment, upon motion for rehearing in that court. The motion was summarily denied.

Petitioners' federal claims were thus made at the earliest opportunity below, were renewed at each stage of appeal, and were finally decided by the Ohio Supreme Court.

STATEMENT OF THE CASE

In 1960 Nancy S. Jones as grantor established by agreement with The Toledo Trust Company, an Ohio banking corporation as trustee, an irrevocable trust, known as Trust No. 4117, for her daughter, Marcia Rivas, as income beneficiary. The trust agreement (A48, A49) provided that upon Marcia's death the principal was to be distributed as she might appoint by her will, among persons or entities belonging to specified classes of appointees, including charitable institutions. The trust agreement further provided that, to the extent Marcia failed effectively to exercise such special testamentary power of appointment, and in the event (as happened) that she left no surviving issue, the property would be distributed to another trust, known as Trust No. 4118, created by the same grantor, of which The Toledo Trust Company was also trustee. A50.

Marcia died in 1982, a resident of California. By her will (A67), probated in Santa Barbara County, California, she exercised her special testamentary power of appointment in favor of a number of charitable institutions, each for a designated share of the property. One such appointee, Alcoholics Anonymous of Santa Barbara, declined to accept so much of its appointed share as exceeded the sum of five hundred dollars. A74.

Upon learning of Alcoholics Anonymous's declination, respondent Santa Barbara Foundation, a charitable institution not named in the will, filed in the Superior Court of the State of California, County of Santa Barbara, where the will had been probated, a "Petition for Determination of Entitlement to Distribution of Estate" (A76), seeking to have itself substituted as appointee of the property by application of the doctrine of *cy pres*. The petition alleged that "various persons and organizations claim an

interest in the Estate of Decedent and in the property in trust subject to Decedent's power of appointment" and named, as among such persons or organizations, Toledo Trust Company at its "residence" and mailing address in Toledo, Ohio. A78-A79, A81.

A "Notice of Hearing" together with a copy of respondent Foundation's petition was then sent by certified mail addressed to "Toledo Trust Company, attn: Gerald W. Miller" (one of its trust officers). The notice was on a form which stated in part:

"This notice is required by law. This notice does not require you to appear in court, but you may attend the hearing if you wish." A86-A87.

This notice was all that petitioners—The Toledo Trust Company as Trustee of Trust No. 4118 (the trust claiming the assets as taker in default of effective exercise of the power of appointment) and The Toledo Trust Company as Trustee of Trust No. 4117 (the trust holding the assets in question)—received prior to the California court's hearing on respondent's petition. The notice was issued pursuant to a California statute, Probate Code §1200.5 (A106), which provided for mailing that form of notice to parties interested in probate proceedings variously described as to subject matter. The statute does not reflect any criteria (e.g. of presence, residence or other contacts with the forum) for subjecting the parties so notified to any assertion of personal jurisdiction. No summons or other process pursuant to a "long arm" statute, or otherwise asserting any basis for compulsory appearance or threatening default for failure to appear, was issued or served.

After a hearing held on October 6, 1983 as stated in the Notice, at which only counsel for respondent Foundation appeared, the California court on October 13, 1983

entered an "Order Determining Entitlement to Distribution of Estate." A96. The "estate" was the *trust estate*, the above-mentioned share of the assets of Trust No. 4117, which the Court "hereby ordered distributed to Santa Barbara Foundation . . ." A97-A98.

Confronted with Trust No. 4118's adverse claim of entitlement to the assets, the Trustee of Trust No. 4117 then brought an action in the Court of Common Pleas of Lucas County, Ohio, the situs of the trust, naming both Trust No. 4118 and respondent Foundation as defendants, and seeking a determination of their respective claims, and instructions as to its duties in the premises. A35.

Taking as the "threshold issue" the question whether, under the terms of the trust agreement, the power of appointment was effectively exercised where the designated appointee had declined, the Court of Common Pleas held that it was unnecessary to pass on the question whether the California order was entitled to full faith and credit. A28. The Ohio Court of Appeals affirmed, substantially on the basis of the common pleas court's reasoning, and further by construing the trust agreement not to permit an exercise of the power to be made effective by resort to *cy pres* where the grantor had expressly provided for a gift in default of effective exercise. A13-A22.

The Ohio Supreme Court granted a motion to certify the record, and reversed. A1-A12. The sole basis for reversal was that the California court's order was entitled to full faith and credit, and was binding on petitioners. A9.

The Ohio Supreme Court denied a motion for rehearing on October 7, 1987. A54.

On remand, the Court of Common Pleas entered an order directing that the trust assets in question be distributed to respondent Foundation. A30-A31.

REASONS FOR GRANTING THE WRIT

I. The Ohio Supreme Court Effectively Ignored This Court's Ruling in *Hanson v. Denckla*

In *Hanson v. Denckla*, 357 U.S. 235 (1958) this Court held the Fourteenth Amendment's guarantee of due process to preclude enforcement of a Florida judgment, determining entitlement to property held and administered in Delaware as a trust asset, as against the Delaware trustee and non-resident trust beneficiary claimants who, though notified of the Florida proceeding, elected not to appear. The question presented was whether Florida's interest in the entitlement determination as a matter of its undoubted probate jurisdiction—over administration of an estate for which the property was claimed as an asset, or over a will claimed to have disposed of the property—was so compelling as to make *notice alone* adequate for affording due process to non-resident parties.

Answering that question in the negative, this Court proceeded in its opinion to test Florida's jurisdictional claims under the traditional heads of *in rem* and *in personam* jurisdictional analysis. The Court found that by neither such test did the exercise of Florida's jurisdiction in respect to determining interests and claims of non-resident, non-appearing parties, satisfy the Fourteenth Amendment's due process mandate.

In the instant case the Ohio Supreme Court cited *Hanson v. Denckla*, but in holding that the California probate judgment was conclusive, and that petitioners, the Ohio trustee and adverse beneficiary claimant, had in effect been defaulted by their having elected not to

appear before the California court, the Ohio Supreme Court selectively ignored what *Hanson v. Denckla* declared. Treating that decision as though it concerned only jurisdiction *in rem*, and noting that in the instant case no such jurisdiction had been claimed, the Ohio court by its majority opinion distinguished *Hanson v. Denckla* as irrelevant:

"In *Hanson v. Denckla*, *supra*, the Supreme Court clearly stated the basis for its determination not to afford full faith and credit to a Florida decision affecting a Delaware trust: '* * * [s]o far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained.' *Id.* at 250. The California judgment in the case at bar presumed to do no such thing." A8-A9.

Having thus treated this Court's principal exposition of constitutional limitations on jurisdiction over trust litigation in multi-state settings as though it dealt only with jurisdiction *in rem*, the Ohio Supreme Court avoided any inquiry as to whether, consistent with due process, there was any alternative basis for the California court's having jurisdiction over petitioners *in personam*.

II. The California Court Lacked Any Basis Consistent With Due Process for Jurisdiction Over Petitioners

The claim in *Hanson v. Denckla* for Florida jurisdiction *in personam* was characterized by this Court as the "stronger argument," 357 U.S. at 250. In the instant case that argument, were it open, would be considerably less forceful. Here the contestants over the property each claimed as trust beneficiaries—Santa Barbara Foundation

as taker by exercise of the testamentary power of appointment, Trust No. 4118 as taker in default of such exercise. No one claimed the property as belonging to the Estate of Marcia Rivas, donee of the power. Hence while the California court was apparently the court in which that estate was being administered, the question before it in this proceeding was extraneous to such administration. This was not a case where "[d]istribution of the assets of the estate could not be made without determining the validity of the power of appointment," *Hanson v. Denckla*, *supra* at 262 (Douglas, J., dissenting), or indeed a case where *any* determination of entitlement pursuant to, or in default of, exercise of the power could have affected the property of the estate, the responsibilities of its executor, or the interest of any person claiming as an estate beneficiary or creditor. Here the California court's only subject matter connection with the donative arrangements on which it was asked to pronounce was that it was the court in which the Rivas will had been admitted to probate.

But even if it were assumed that the California court had *some* basis of subject matter jurisdiction to construe or reform the will in relation to the testatrix's attempted exercise of the power of appointment,¹ it is clear that mere notice of its proceeding was constitutionally insufficient to make that court's judgment binding on either of the petitioners, non-residents of California, who chose not to appear. While here, as in *Hanson v. Denckla*, *supra*,

"There is no suggestion that the court failed to employ a means of notice reasonably calculated to

1. But see, *Blount v. Walker*, 134 U.S. 607 (1890).

inform non-resident defendants of the pending proceedings, or denied them an opportunity to be heard in defense of their interests. The alleged defect is the absence of those 'affiliating circumstances' without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interests in property (jurisdiction *in rem* or *quasi in rem*)." *Id.* at 245-6.

The Ohio Supreme Court did not find, nor does the record disclose, any such "affiliating circumstances."

Prior to the adoption of the Fourteenth Amendment it was "intimated, if not held" by some state courts that an effective personal judgment could be rendered against a non-resident party, who did not appear and submit to the rendering court's jurisdiction, upon notice to that party by publication or by extraterritorial service pursuant to a statute in the rendering state, *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403 (1917). But with the adoption of the Fourteenth Amendment, and ever since this Court's decision in *Pennoyer v. Neff*, 95 U.S. 714 (1878), the guarantee that "No State shall . . . deprive any person of life, liberty or property, without due process of law . . ." has been recognized as a limitation on enforcement of judgments—whether by courts of the rendering state, e.g. *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), or by courts of a sister state, e.g. *Riley v. New York Trust Co.*, 315 U.S. 343 (1942)—against parties not present or residing in the rendering state, and who did not appear before its court.

The scope of this due process limitation has been redefined over time, to extend beyond criteria of presence or residence, e.g. *Milliken v. Meyer*, 311 U.S. 457 (1940), to "certain minimum contacts with [the forum] such that

the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Such "minimum contacts" have been found to consist in actions taken within the forum state, *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), or "purposefully directed" there, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), or involving "deliberate affiliation" with its legal system, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985).

Once such "minimum contacts" are established, consideration then turns to "other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice,'" *Burger King, supra* at 476, *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S., 107 S. Ct. 1026, 1033-4, 94 L.Ed.2d 92, 105 (1987).

Among such "other factors" which this Court has recognized, two are especially meaningful here. One is the jurisdictional significance of a deliberately made choice of law, in weighing the reasonableness or fairness of subjecting a non-resident to personal jurisdiction in a particular forum, *Burger King, supra* at 481-2. That choice points away from California in the instant case, the grantor of Trust No. 4117 having expressly directed, in Article VII of the trust agreement, that "This agreement and all of the trust assets held in trust hereunder shall be subject to and held, administered and distributed in accordance with the laws of the State of Ohio." A65.

The other such especially significant factor is "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

These two factors are brought to focus in multi-state settings for trust litigation by the doctrine of *Hanson v. Denckla*. Absent some basis for personal jurisdiction over all necessary parties by their presence, residence or appearance in a forum, or by serving them with process pursuant to a "long arm" statute where some affiliation by "contacts" exists, e.g. *Miller v. Davis*, 507 F.2d 308 (6th Cir., 1974), the situs for such litigation is restricted to what commentators have called the place of "primary supervision"² of a trust, where, having jurisdiction over the trustee and *in rem* over the trust assets, a court can require the appearance of all interested parties and adjudicate their respective interests. That situs ordinarily reflects the grantor's choice of law and governance for the trust, a choice made impliedly by establishing the trust there, or as here by express provision in the trust agreement. And to the extent the doctrine of *Hanson v. Denckla* thus restricts the available forums for trust litigation in multi-state settings, it appropriately reduces the possibility of parallel proceedings being prosecuted simultaneously in courts of more than one state, with the outcome determined in whichever such proceeding comes first to judgment, see, e.g. *In re: Morgan Guaranty Trust Co.*, 28 N.Y.2d 155, 170, 269 N.E.2d 571, 580 (1971) (dissenting opinion of Breitel, J.). Reflecting on these considerations, Professor Scott wrote:

"In policing the distribution of power among the states, [the U.S. Supreme Court] must take a position one way or the other. I think that it is fortunate that the Supreme Court held that it was Delaware and not Florida which had control over the disposition of the property, and held that, except so far as

2. See, e.g. 5 Scott, *Trusts* §571 (3d ed., 1967).

the jurisdiction of the Florida court might be based on personal jurisdiction over some of the beneficiaries, it had no power to determine who should ultimately receive the property." Scott, *Hanson v. Denckla*, 72 Harv. L. Rev. 695, 708 (1959).

III. The Ohio Supreme Court's Ruling Has Widespread Application to, and Disruptive Effect on Trust Litigation

The Ohio Supreme Court's ruling in this case is more than an aberration. This Court must be concerned with its consequences, which implicate not only the interstate, but the federal judicial system.

Millions of Americans hold trust powers at least analogous to the one exemplified here. Apart from powers of appointment granted under private trusts are provisions of pension plans which authorize plan participants to direct distribution of plan assets during their lifetime, or succession following their death. With respect to pension plans incorporating such powers of direction, as well as with respect to private trusts incorporating powers of appointment, courts of the state where the holder of the power is or was domiciled may be called upon, in some cases to direct an exercise of the power (by a guardian, for example, where the holder is incompetent³), and in other cases to construe some act of exercise or determine its effect. Rulings on such matters will in many cases affect the interests of parties not residents of the power-holder's domicile, who claim trust property adversely to suitors petitioning the domiciliary court.

3. See, e.g. *Toledo Trust Co. v. National Bank of Detroit*, 50 Ohio App. 2d 147, 362 N.E.2d 273 (Lucas Co. Ct. App., 1976).

If, by a failure to enforce adherence to jurisdictional due process limitations laid down by this Court in *Hanson v. Denckla*, the non-resident claimants were threatened with default upon failing to appear in the court of the power-holder's domicile, then it may be expected that they would so appear. But in many such cases the non-resident claimants, or some of them, may also be expected to initiate parallel proceedings for determination of the same matters in some other state forum where, as the situs of the trust, jurisdiction over all interested parties might be acquired *in rem*, or *quasi in rem*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), or where, if such parties can be served personally or appear voluntarily, jurisdiction might be acquired *in personam*, *Underwriters National Assurance Co. v. North Carolina Life Guaranty Ass'n.*, 455 U.S. 691, 711 (1982).

The prospect of simultaneous parallel proceedings in multiple state forums is disturbing from the standpoint of trust, as well as judicial administration. Confronted with that prospect, which extends not only to conflicting, or "first-to-judgment" rulings on the merits of a trust dispute, but to conflicting or uncertain state court jurisdictional assessments, trustees will be impelled to seek relief in the federal courts under the Interpleader Act, 28 U.S.C. §1335. As this Court has said:

"The difficulties such a race to judgment [by claimants in multiple state forums] pose for the insurer, and the unfairness which may result to some claimants, were among the principal evils the interpleader device was intended to remedy. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 533 (1967).

For "insurer," here read "trustee." And trustees would find themselves well advised to file such federal interpleader suits early, upon mere threat of multiple state court proceedings, given the concern that a state court proceeding in which jurisdiction *in rem* attaches may preclude subsequent initiation of federal interpleader, cf., *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939). But since, while the Interpleader Act provides for nationwide service of process, 28 U.S.C. §2361, it prescribes venue in the district where one or more of the claimants reside, 28 U.S.C. §1397, the interpleader situs may be foreign to the trustee or to the situs of trust administration.

The burden of "practical uncertainties" of state court jurisdictional limitations has already been cited by commentators to predict that "this area of interpleader may become an exception to the efforts to reduce federal court diversity jurisdiction," Scoles and Hay, *Conflict of Laws*, 255 (1984). That prediction would be fulfilled for trust litigation in multi-state settings, to whatever extent that litigation is afflicted by such uncertainties.

Thus, the ultimate consequence of a failure of what Professor Scott has described as this Court's Fourteenth Amendment "policing" of the distribution of judicial power among the states,⁴ would be substitution of another regime of "policing" by federal courts, under the Interpleader Act.

We know of no reason why this should be thought desirable.

4. *Supra* at 708.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

E. THOMAS MAGUIRE

Counsel of Record

MICHAEL S. MESSENGER

ROBISON, CURPHEY & O'CONNELL

Four SeaGate, 9th Floor

Toledo, Ohio 43604

(419) 249-7900

Attorneys for Petitioner The

Toledo Trust Company, as

Trustee of Trust No. 4118

DONALD F. MELHORN, JR.

Counsel of Record

MARSHALL & MELHORN

Four SeaGate, 8th Floor

Toledo, Ohio 43604

(419) 249-7100

Attorney for Petitioner The

Toledo Trust Company, as

Trustee of Trust No. 4117

87 1132 (2)

No.

Supreme Court, U.S.
FILED

JAN 5 1988

In the Supreme Court of the United States

October Term, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118 AND THE TOLEDO TRUST COM-
PANY, AS TRUSTEE OF TRUST NO. 4117,

Petitioners,

vs.

SANTA BARBARA FOUNDATION,

Respondent.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
To the Ohio Supreme Court**

E. THOMAS MAGUIRE

Counsel of Record

MICHAEL S. MESSENGER

ROBISON, CURPHEY & O'CONNELL

Four SeaGate, 9th Floor

Toledo, Ohio 43604

(419) 249-7900

*Attorneys for Petitioner The
Toledo Trust Company, as
Trustee of Trust No. 4118*

DONALD F. MELHORN, JR.

Counsel of Record

MARSHALL & MELHORN

Four SeaGate, 8th Floor

Toledo, Ohio 43604

(419) 249-7100

*Attorney for Petitioner The
Toledo Trust Company, as
Trustee of Trust No. 4117*



TABLE OF CONTENTS

Opinion of the Supreme Court of Ohio, August 26, 1987	A1
Decision and Journal Entry of the Court of Appeals of Lucas County, Ohio, May 9, 1986	A13
Supplemental Decision and Orders of the Court of Appeals of Lucas County, Ohio, May 21, 1986	A22
Opinion and Judgment Entry of the Court of Common Pleas of Lucas County, Ohio, July 29, 1985	A24
Order of the Court of Common Pleas of Lucas County, Ohio Enforcing Mandate, November 19, 1987	A30
Judgment Entry of the Supreme Court of Ohio, August 26, 1987	A32
Mandate of the Supreme Court of Ohio, August 26, 1987	A33
Entry of the Supreme Court of Ohio Denying Rehearing, October 7, 1987	A34
Complaint Filed in the Court of Common Pleas of Lucas County, Ohio, November 3, 1983	A35
Answer of Santa Barbara Foundation Filed in the Court of Common Pleas of Lucas County, Ohio	A38
Answer of Trust No. 4118 Filed in the Court of Common Pleas of Lucas County, Ohio	A41
Stipulations and Attached Exhibits Filed in the Court of Common Pleas of Lucas County, Ohio, April 24, 1985	A43
Exh. A. Trust Agreement	A48
Exh. B. Will of Marcia MacDonald Rivas	A67

II

Exh. C. Declaration of Declination - Alcoholics Anonymous	A74
Exh. D. Petition for Determination of Entitlement to Distribution of Estate - Santa Barbara Foundation	A76
Exh. E. Notice of Hearing (Probate)	A86
Exh. F. Order Determining Entitlement to Distribution of Estate	A96
Exh. G. Articles of Incorporation, Santa Barbara Foundation	A101
California Probate Code, §1200.5	A106

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided August 26, 1987)

No. 86-1064

THE SUPREME COURT OF OHIO
COLUMBUS

TOLEDO TRUST COMPANY, TRUSTEE OF
TRUST NO. 4117,

Appellee,

v.

SANTA BARBARA FOUNDATION,
Appellant,

and

TOLEDO TRUST COMPANY, TRUSTEE OF
TRUST NO. 4118, *et al.,*

Appellees.

[32 Ohio St. 3d 141]

Trusts—Testamentary special power of appointment conferred by Ohio trust—Effective exercise by donee determined by law of his domicile—Determination of intent of donee in exercising power is entitled to full faith and credit, when—Foreign judgment carries presumption of validity, when.

O.Jur 3d Estates etc. § 192.

1. The determination of whether a testamentary special power of appointment conferred by an Ohio trust has been effectively exercised by the donee is gov-

erned by the law of the jurisdiction wherein the donee was domiciled at the time of the power's purported exercise.

O.Jur 3d Judgments § 351.

2. A foreign judgment pronounced by a court of record of general jurisdiction, regular on its face, carries with it the presumption of validity.
3. The determination of the intent of a donee in exercising a testamentary special power of appointment by a court of competent jurisdiction of the state within which the donee is domiciled at the time of the power's exercise is binding in any subsequent judicial proceedings in Ohio and entitled to full faith and credit with respect thereto.

APPEAL from the Court of Appeals for Lucas County.

On January 28, 1960, a written trust agreement was executed between Toledo Trust Company and Nancy S. Jones whereby a trust for the benefit of Marcia MacDonald Rivas, daughter of Nancy S. Jones, was created ("Rivas trust"). Contemporaneously with the creation of this trust, another trust was created for the benefit of Roberta Pawlak, the other daughter of Nancy S. Jones ("Pawlak trust"). The Rivas trust granted to Marcia Rivas a testamentary special power of appointment whereby she could designate certain charitable beneficiaries of the trust corpus. The agreement provided in relevant part:

"(2) Upon the death of the Donor's said daughter, the then existing principal shall be distributed to such one or more among her issue, spouses (including widows and widowers) of such issue, sister, sister's issue, and any institutions or associations organized and operated

exclusively for religious, charitable, scientific, literary or educational purposes, in such shares or proportions and upon such terms, conditions and estates in trust or otherwise, as the Donor's said daughter may by her Last Will and Testament appoint, provided that her said Will shall expressly refer to the power of appointment hereunder, and provided further that such power of appointment shall not be exercisable in favor of the Donor's said daughter, her estate, her creditors or the creditors of her estate."

The Rivas trust further provided:

"(3) To the extent the Donor's daughter fails effectively to exercise the power of appointment granted to her in the proceeding paragraph (2), at the time of her death the then existing principal (including accumulated income) shall be held or distributed as follows:

"(a) If the Donor's daughter leaves issue living at the time of her death, such principal shall vest per stirpes in and, subject to the provisions of paragraph (4) hereof, be distributed to such of her issue as are living at that time;

"(b) If said daughter leaves no issue living at the time of her death, then such principal shall be distributed as follows:

"(i) If the Donor's daughter, Roberta, is living at that time, it shall be added to and become a part of the trust created simultaneously herewith for the benefit of the Donor's daughter, Roberta, with the Toledo Trust Company as Trustee and designated on the trustee's records as Trust No. 4118 and shall be administered and distributed in accordance with the provisions thereof.

* * *

Marcia Rivas died on November 10, 1982, a resident of Santa Barbara, California. At the time of her death, she was survived by her sister, Roberta Pawlak. Her last will and testament was admitted to probate on August 1, 1983. The will provided for the exercise of the testamentary special power of appointment granted by the trust agreement. It provided in relevant part:

Under that certain Trust Agreement entered into January 25 [sic], 1960, between my mother, NANCY S. JONES and TOLEDO TRUST COMPANY, I have a special power of appointment. The permissible appointees under this power of appointment are limited to my issue, spouses (including widows and widowers) of such issue, my sister, my sister's issue, and any institutions or associations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes. I exercise this power of appointment by appointing all property subject to this power as follows:

"* * *

"(I) Ten percent (10%) thereof shall be distributed to ALCOHOLICS ANONYMOUS, Central Office, 1129 State Street, Santa Barbara, California 93101."

Alcoholics Anonymous declined to accept more than \$500 of the trust distribution—adhering to a policy whereby gifts in excess of this amount are accepted only from members of the organization.

On September 16, 1983, appellant petitioned the Superior Court of the state of California, County of Santa Barbara, for a determination of entitlement to the trust proceeds. Notice of this action was received by appellees Toledo Trust Company and Nancy S. Jones.

The superior court, utilizing the equitable doctrine of cy pres, substituted the Santa Barbara Foundation for Alcoholics Anonymous as an appointee of the trust proceeds. Santa Barbara Foundation is a non-profit corporation organized for the treatment and care of alcoholics. The court entered an order directing that Santa Barbara be substituted for Alcoholics Anonymous as the beneficiary of ten percent of the trust assets.

Having obtained the California order, the Santa Barbara Foundation applied to Toledo Trust Company, as trustee of the Rivas trust, for payment of the funds governed by the order. The trustee refused and thereafter instituted the present declaratory judgment action.

Ruling on cross-motions for summary judgment filed by the respective parties, the trial court determined that the refusal of Alcoholics Anonymous to accept all but \$500 of the distribution defeated an effective exercise of power of appointment under the trust. The court therefore granted summary judgment in favor of the Toledo Trust Company, as trustee of the Pawlak trust, and ordered that pursuant to the terms of the Rivas trust agreement, the amount in controversy be distributed to the Pawlak trust. This determination was affirmed by the court of appeals.

The cause is now before this court upon the allowance of a motion to certify the record.

Marshall & Melhorn and Donald F. Melhorn, Jr., for appellee Toledo Trust Company, Trustee for Trust No. 4117.

Watkins, Bates & Handwork, William F. Bates, John J. McHugh III and Gary O. Sommer, for appellant.

Robinson, Curphey & O'Connell and Michael S. Messenger, for appellees Toledo Trust Company, Trustee for Trust No. 4118 and Nancy S. Jones.

SWEENEY, J. The crucial question presented by this appeal is the effect, if any, that the order of the California superior court has on the instant proceeding. It is axiomatic that, in interpreting the terms of a will, the intention of the testator is paramount. *Sherman v. Sherman* (1966), 5 Ohio St. 2d 27, 34 O.O. 2d 48, 213 N.E. 2d 360; *Johnson v. Johnson* (1894), 51 Ohio St. 446, 38 N.E. 61; *Townsend's Exrs. v. Townsend* (1874), 25 Ohio St. 477. This rule is equally applicable in determining whether a testamentary power of appointment has been exercised. *Bishop v. Remple* (1860), 11 Ohio St. 277, 282; *Arthur v. Odd Fellows' Beneficial Assn.* (1876), 29 Ohio St. 557, 561.

The ascertainment of testamentary intent often requires that reference be made to common-law or statutory rules of construction. Where such reference is necessary, the law of the state wherein the testator was domiciled and his will probated is to be applied. *Lozier v. Lozier* (1919), 99 Ohio St. 254, 124 N.E. 167.

While the specific issue involved in this appeal has not been previously submitted for our consideration, we are persuaded that the law of the state in which the decedent resided at the time of her death should apply in determining whether there has been an effective exercise of her testamentary special power of appointment. On this point the observation by the Seventh Circuit Court of Appeals in *White v. United States* (C.A. 7, 1982), 680 F. 2d 1156, 1159, is particularly instructive: "Given the realities of the situation, it seems logical to focus

on the donee's express, implied, or *constructive* intent to exercise his power as determined by the rules of his state. The language of the donee's will is his own and should be considered according to the laws under which his will was drafted and with which he was presumably most familiar, those of his own domicile." (Emphasis added.) See, also, *In re Morgan Guaranty Trust Co.* (1971), 28 N.Y. 2d 155, 320 N.Y. Supp. 2d 905, 269 N.E. 2d 571; *Ward v. Stanard* (1903), 82 App. Div. 386, 81 N.Y. Supp. 906.

Marcia MacDonald Rivas was a California domiciliary at the time of her death. Her will was executed and admitted to probate in the state of California. In its order determining entitlement to distribution of the Rivas estate, the California superior court quite properly applied the *cy pres* doctrine to the present controversy. It is beyond question that application of the doctrine was in accordance with California law. See *O'Hara v. Grand Lodge, Independent Order of Good Templars* (1931), 213 Cal. 131, 2 P. 2d 21; *In re Faulkner's Estate* (1954), 128 Cal. App. 2d 575, 275 P. 2d 818.

We, therefore, hold that the determination of whether a testamentary special power of appointment conferred by an Ohio trust has been effectively exercised by the donee is governed by the law of the jurisdiction wherein the donee was domiciled at the time of the power's purported exercise.

Despite the correct application of California law to the testamentary disposition, appellees, Toledo Trust Company, as trustee of the Pawlak trust, and Nancy Jones, maintain that the judgment of the California superior court is not entitled to full faith and credit because the

court failed to obtain jurisdiction over the trustee or the trust res. There are two elements to this argument.

As an initial matter, it is necessary to consider whether appellees were properly apprised of the California proceedings. In stipulations of fact submitted to the Lucas County Court of Common Pleas, Toledo Trust Company has acknowledged receiving notice of the entitlement hearing. Moreover, the findings of the California superior court include a determination that "[a]ll notices of the hearing have been given as required by law."

This court has previously observed that "[a] judgment pronounced by a court of record of general jurisdiction, regular on its face, carries with it the presumption of validity." *Ford v. Ideal Aluminum, Inc.* (1966), 7 Ohio St. 2d 9, 13, 36 O.O. 2d 5, 7, 218 N.E. 2d 434, 436. This presumption applies with equal force to judgments rendered by the courts of sister states. Appellees do not contend that the California proceeding failed to comply with the law of that state, nor do they adduce any evidence in support of such contention. We, therefore, hold that a foreign judgment pronounced by a court of general jurisdiction, regular on its face, carries with it the presumption of validity.

An additional component of the argument advanced by appellees concerns the perceived deficiency of the California court in obtaining jurisdiction over the trust assets located in Ohio. In support of their position, appellees rely upon the holding of the United States Supreme Court in *Hanson v. Denckla* (1958), 357 U.S. 235. This argument, however, misapprehends the nature of the California proceeding. In *Hanson v. Denckla*, *supra*, the Supreme Court clearly stated the basis for its determination

not to afford full faith and credit to a Florida decision affecting a Delaware trust: "* * * [s]o far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained." *Id.* at 250. The California judgment in the case at bar presumed to do no such thing. The decision of the California superior court merely sought to ascertain and give effect to the testamentary intent of a California domiciliary. As mentioned above, it was the proper forum to make this determination. Once rendered, the judgment was entitled to full faith and credit in any subsequent Ohio proceeding governing the disposition of the trust assets.

It is our conclusion, therefore, that the determination of the intent of a donee in exercising a testamentary special power of appointment by a court of competent jurisdiction of the state within which the donee is domiciled at the time of the power's exercise is binding in any subsequent judicial proceedings in Ohio and entitled to full faith and credit with respect thereto.

Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

*Judgment reversed
and cause remanded.*

MOYER, C.J., HOLMES, DOUGLAS, WRIGHT and H. BROWN, JJ., concur.

LOCHER, J., dissents.

LOCHER, J., dissenting. Although I have no quarrel with the general principles of law expressed in the syllabus and majority opinion, I must dissent because it is clear that the California superior court erroneously ap-

plied the doctrine of cy pres in the case *sub judice*. Because the California judgment is contrary to California law, and because the California court had no jurisdiction over the trust assets in question, I would hold that the judgment of that court is not entitled to full faith and credit in the courts of Ohio.

To begin, a review of relevant California law reveals a statute which expressly provides for a result contrary to that reached by the California superior court and the majority opinion. California Civ. Code Section 1389.3 states:

“(a) Except as provided in subdivision (b), *when the donee of a discretionary power of appointment fails to appoint the property, releases the entire power, or makes an ineffective appointment, in whole or in part, the appointive property not effectively appointed passes to the person or persons named by the donor as takers in default or, if there are none, reverts to the donor.*

“(b) When the donee of a general power of appointment makes an ineffective appointment, an implied alternative appointment to the donee’s estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment.” (Emphasis added.)

This statute is clearly on point. The donee, Marcia Rivas, made an ineffective appointment when Alcoholics Anonymous refused to accept more than \$500 of the trust distribution. Marcia Rivas also had a discretionary power of appointment. See California Civ. Code Section 1381.4. Thus, under Section 1389.3(a), the trust assets not effectively appointed by the will of Marcia Rivas pass to the taker in default as provided by the trust document,

namely the Roberta Pawlak trust. Also on point is *Estate of Eddy* (1982), 134 Cal. App. 3d 292, 184 Cal. Rptr. 521, in which it was held that under the statute, where a donee failed to effectively exercise a power of appointment in her will, the trust property passed to the donor's son, who was named as the taker in default. In light of the statute and this case, it can only be concluded that the California superior court erred when it applied the doctrine of cy pres to the trust assets in question.

The California decision is also invalid because it ignored the express language of the trust to the effect that if the donee failed to make an effective appointment, the trust property was to be held for or distributed to one of the named takers in default. The cy-pres doctrine is designed to give effect to the intent of a donor, not to thwart it. For this reason, the cy-pres doctrine does not apply where, as here, the donor's intent is to the contrary. See, e.g., Restatement of the Law 2d, Trusts (1959), Section 399, Comment c, at 299; Section 401, Comment d, at 311.

Generally, the final judgment of a sister state's court must be given full faith and credit where that court had jurisdiction over the parties and the subject matter, even if the judgment is erroneous. See *Milliken v. Meyer* (1940), 311 U.S. 457, 462. However, a judgment of a sister state's court is subject to collateral attack in Ohio if there was no subject matter or personal jurisdiction to render the judgment under the sister state's internal law, and under that law the judgment is void.

The California superior court in this case had no jurisdiction over either Toledo Trust Company, the trustee, or the trust assets. The mere fact that notice of the hearing in the California superior court was mailed to Toledo

Trust does not subject Toledo Trust to the jurisdiction of that court. Furthermore, since the trust assets belong to the Roberta Pawlak trust, the California superior court had no jurisdiction over them. See *Hanson v. Denckla* (1958) 357 U.S. 235. The majority unpersuasively attempts to distinguish *Hanson* by stating that the California decision "merely sought to ascertain and give effect to the testamentary intent of a California domiciliary," rather than exercise jurisdiction over the trust assets. In my view, this is a meaningless distinction, for how could the California court purport to decide to whom to distribute the trust assets without exercising jurisdiction over those assets?

In summary, the majority opinion is ill-founded because it merely presumes that the California judgment is valid. A closer look, however, reveals that under California law the California superior court had no jurisdiction over the parties or the subject matter in question, rendering the California judgment void. Consequently, I would hold that the California judgment is not entitled to full faith and credit, and I would affirm the summary judgment of the trial court in favor of the Toledo Trust Company. Accordingly, I dissent.

**DECISION AND JOURNAL ENTRY OF THE COURT
OF APPEALS OF LUCAS COUNTY, OHIO**

(Filed May 9, 1986)

C. A. No. L-85-293

COURT OF APPEALS OF OHIO
SIXTH DISTRICT
COUNTY OF LUCAS

THE TOLEDO TRUST COMPANY AS TRUSTEE
OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY AS TRUSTEE OF
TRUST NO. 4118

and

NANCY S. JONES,
Appellees.

APPEAL FROM LUCAS COUNTY COMMON PLEAS COURT
No. CV 83-2699

DECISION AND JOURNAL ENTRY

This case comes before the court on a judgment of the Lucas County Court of Common Pleas. The trial court, upon review of the stipulations and documents in evidence, granted plaintiff-appellee's motion for summary judgment. The court ordered that the assets disclaimed by the Al-

coholics Anonymous were to be distributed to trust No. 4118, decedent's sister's trust.

On January 28, 1960, Nancy Jones named the Toledo Trust Co. as trustee for two trusts which were created for the benefit of her two daughters, Marcia McDonald Rivas and Roberta Pawlak. The trust contained a testamentary special power of appointment allowing each daughter to make distributions of principal and accumulated income to specified members of a class; said class included each daughter's issue, spouses of said issue, a sister, the sister's issue, and institutions organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.

The trust agreement also contained the following provision, as set forth in pertinent part:

"(3) To the extent the Donor's daughter fails effectively to exercise the power of appointment granted to her in the preceding paragraph (2), at the time of her death the then existing principal (including accumulated income) shall be held or distributed as follows * * * [.]"

Provision (3) then provided that said proceeds would go to the deceased daughter's issue *per stirpes*, if any. If the daughter had no surviving issue, the proceeds were to go to her sister's trust, if the sister was living at the time of the death. This latter provision was pertinent since decedent's sister was alive at the time of decedent's death.¹

1. There were additional provisions pertaining to the distribution of the proceeds upon the death of Jones' daughter, if the deceased individual's sister was not alive at the time of the death. However, those provisions are not applicable based on the facts set forth in this case.

On November 10, 1982, Marcia Rivas died, and was survived by her sister, Roberta Pawlak. In her last will and testament Marcia Rivas exercised the special power of appointment contained in the trust agreement. Distributions were made in favor of eleven charities, including Alcoholics Anonymous of Santa Barbara, California. Alcoholics Anonymous declined the gift, except for an amount totaling \$500. Subsequently, the Superior Court of the State of California, County of Santa Barbara, entered an order directing that the proceeds be distributed to Alcoholics Anonymous, in excess of \$500, be paid to the Santa Barbara Foundation, appellant herein.

Toledo Trust declined to distribute the funds, and sought direction of the court to determine who was entitled to receive the proceeds. At the lower court, appellant raised three principle issues. First, appellant argues that decedent made an effective and valid exercise of her special power of appointment when she allocated the proceeds to Alcoholics Anonymous, and that the California court, by application of the doctrine of *cy pres*, fulfilled her donative intent by ordering the distribution of the proceeds to appellant. Alternatively, appellant argues that the doctrine of *cy pres* should apply even under the laws of the state of Ohio and distribution should be made accordingly. Further, appellant argues that the California judgment was entitled to full faith and credit and as such, appellant was entitled to receipt of the proceeds.

Defendant Toledo Trust contended that there was no valid exercise of the special power of appointment, since Alcoholics Anonymous refused to accept the distribution of the proceeds. Toledo Trust further argued that the doctrine of *cy pres* was not applicable, and that the judg-

ment of the California court was not entitled to full faith and credit.

The trial court, after thorough analysis of the novel issues raised, ruled that there had not been a valid and effective exercise of the special powers of appointment. Having so ruled, the court concluded that it need not reach the issues of application of *cy pres* and the question concerning whether full faith and credit should be granted the California judgment.

Based on the well-reasoned opinion of the trial court, which this court adopts as part of its reasoning, we affirm the decision of the lower court.²

2. The court stated as parts of its decision:

"The court has conducted a thorough review of the case law in Ohio and finds itself without guidance on this issue. While the case law has addressed the technical requirements for a valid exercise it has not addressed the effect of an appointee's disclaimer on the exercise of a special power of appointment. Santa Barbara's position is that since Ms. Rivas complied with both the common law requirements necessary for a valid exercise and with the specific terms of the Rivas trust, the exercise was valid. Defendant Toledo Trust distinguished between a valid exercise and an effective exercise, arguing that an effective exercise requires an actual transfer of the appointed assets to the donee. Since Alcoholics Anonymous disclaimed all but \$500 of the appointed assets, Toledo Trust maintains that the exercise was ineffective and the gift-over provision takes effect.

"After careful consideration of the ramification of both positions, the Court finds the argument of defendant Toledo Trust persuasive. Critical to the Court's decision is the principle that property over which one has a special power of appointment is considered to be property of the donor of the power; the donee of the power only acts on behalf of the donor. *Cleveland Trust Co. v. McQuade*, 106 Ohio App. 237 (1957). Unless the donee effectively transfers the property to the appointee, ownership remains in the donor; the donee never becomes the owner of the property. Therefore, it appears to this Court that acceptance by the appointee is necessary for the effective transfer of owner-

(Continued on following page)

The primary issue is whether the trust agreement, dated January 28, 1960, permits the application of the doctrine of *cy pres* to establish that the donee's testamentary disposition constituted a valid and effective exercise of the special power of appointment, where the donee's disposition was declined by the beneficiary.³

As recognized by the lower court, the validity of the special power of appointment is to be determined under the law governing the validity of the instrument under which the power was created. Bogert, *Trust & Trustees* (2d Ed. Rev. 1977 & Supp. 1985) 482, Section 299; *Cleveland Trust Co. v. Shuman* (1974), 68 O.O. 2d 332.

A valid exercise of a special power of appointment occurs when the donee's instrument meets the formalities

Footnote continued—

ship and thereby, for an effective exercise of the power. Accord, *Commissioner v. Cardeza's Estate*, 173 F. 2d 119 (3d Cir. 1949); 5 *Page on Wills* §45.23 (4th Ed. 1962); see, 5 A.W. Scott, *The Law of Trusts*, §427 (3d Ed. 1967).

"Application of the foregoing to the instant facts requires the Court to conclude that the exercise of the special power of appointment was ineffective, leaving ownership of the assets with the donor. Thus, it is the donor's intent which will guide distribution of the assets and not that of the donee. The donor's intent is clearly evidenced by the gift-over provision which requires distribution of the assets to trust No. 4118 in the event of default of appointment. Accordingly, the Court finds that the assets disclaimed by Alcoholics Anonymous are to be distributed pursuant to that provision.

"In light of the foregoing determination, the Court need not reach the issues of the validity of the California judgment and the applicability of the doctrine of *cy pres*."

3. Appellants state as their assignments of error:

"Assignment of Error No. 1: The Trial Court Erred in Ruling that Marcia McDonald Rivas Failed Effectively to Exercise the Power of Appointment Granted to Her Under Trust No. 4117."

required by the applicable state law and complies with the limitations set forth in the originating document.

While the formalities may have been met in this case, the question of the effectiveness of the disposition remains in question due to Alcoholics Anonymous's refusal to accept the proceeds.

In this case, the disposition of the trust proceeds was unquestionably intended for charitable purposes. It is equally clear that the intended distribution was rejected and as such the trust failed. At this point in the lower court's analysis, the court determined that the rejection of the distribution constituted an ineffective transfer of the proceeds and as such, the lower court rejected Santa Barbara's claim for the proceeds. While the lower court was correct in its conclusion, the court only made the first inquiry in the analysis.

The initial inquiry necessitates a review of the document creating the special power of appointment to determine the extent of the powers granted. The next inquiry necessitates a determination of whether the exercise of the special power of appointment failed. If the initial exercise of the special power of appointment fails for whatever purpose, the third step requires the determination of whether the originating document permits the failed distribution to be allocated to someone other than the intended beneficiary. Fourth and finally, if the originating document permits a failed distribution to be allocated to another, the court must then determine whether the doctrine of *cy pres* may be applied in order to carry out the intent of the donee. Cf. Restatement of Law Second, Trusts 2d (1957 & Supp. 1983-84) 299, 305, Section 399, comments c and o.

Here the original device failed. As such, we must determine whether the trust agreement permitted the donee to make an additional distribution of the property.

In instances where the donee has been given the special power of appointment, the intent of the donee's exercise of power must be construed within the basic limitations prescribed by the donor. Consequently, while the donee may have manifested a general donative intent which would have supported the application of the doctrine of *cy pres*, the application of the doctrine may not be applied if the settlor, in the trust agreement, restricted the donee's special powers of appointment.

With respect to specific provisions being set forth in the trust, the Restatement of Law, *supra*, at 299, Section 399, has stated, in situations not specifically relating to special powers of appointment:

"If property is given in trust to be applied to a particular charitable purpose, and it is provided by the terms of the trust that if the purpose should fail the trust should terminate, the property will not be applied *cy pres* on the failure of the particular purpose, since the terms of the trust negative the existence of a general charitable intention. In such a case there will be a resulting trust for the settlor or his estate, unless there is a valid gift over. See Section 413. * * *"

Restatement of Law, Trusts, *supra*, at 348, Section 413, comment b, states further:

"If the settlor properly manifested an intention that if the charitable trust should fail the trustee should hold the surplus upon another charitable trust or upon

a valid private trust, no resulting trust arises but the trustee holds the property upon the other charitable or private trust."

The foregoing passages serve to recognize that the doctrine of *cy pres* is not applicable where the terms of the trust agreement provide for an alternative distribution of the proceeds, if the donee fails to make an effective exercise of the special power of appointment.

In this case, the originating document, i.e. trust agreement, states that if there is an ineffective testamentary disposition, then the proceeds shall go to one of several alternatives. This provision serves to negate the application of the doctrine of *cy pres* since the original donor made an express statement as to who should receive the proceeds upon an ineffective transfer. See Restatement of the Law, Trusts, Sections 348, 349 and 413. The express provisions in the document prohibit the application of the *cy pres* doctrine. Accordingly, when the distribution to the Alcoholics Anonymous was declined, the testamentary disposition failed. The application of the doctrine of *cy pres* was not possible since the trust agreement provided for an alternative disposition of the proceeds. Said alternative disposition required, based upon the facts, that the proceeds that were to be allowed to Alcoholics Anonymous shall be placed in trust No. 4118, the Pawlak trust.

Accordingly, appellant's three assignments of error are found not well-taken.

On consideration whereof, this court finds substantial justice was done the parties complaining, and judgment of the Lucas County Court of Common Pleas is affirmed. Cause is remanded to said court for further proceedings according to law. Costs to appellants.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

ARTHUR WILKOWSKI, J.,

RICHARD B. MCQUADE, JR., J., and

JAMES E. THIERRY, J.

Concur.

Judge Richard B. McQuade, Jr., Fulton County Court of Common Pleas, and Judge James E. Thierry, Ottawa County Court of Common Pleas, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

**SUPPLEMENTAL DECISION AND ORDERS OF
THE COURT OF APPEALS OF LUCAS COUNTY,
OHIO**

(Filed May 21, 1986)

No. L-85-293

IN THE COURT OF APPEALS OF LUCAS COUNTY

THE TOLEDO TRUST COMPANY AS TRUSTEE
OF TRUST NO. 4117,
Appellee,

v.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY AS TRUSTEE OF
TRUST NO. 4118 AND NANCY S. JONES,
Appellees.

DECISION AND JOURNAL ENTRY

This matter comes before the court, *sua sponte*. On May 9, 1986, this court released a decision entitled *The Toledo Trust Co. v. Santa Barbara Foundation* (May 9, 1986), Lucas App. No. L-85-293, unreported.

On page three, paragraph one, the first sentence reads as follows:

"Defendant Toledo Trust contended that there was no *valid* exercise of the special power of appointment, since Alcoholics Anonymous refused to accept the distribution of the proceeds."

The sentence is corrected to read as follows

"Defendant Toledo Trust contended that there was no *effective* exercise of the special power of appointment, since Alcoholics Anonymous refused to accept the distribution of the proceeds."

ARTHUR WILKOWSKI,
RICHARD B. MCQUADE, JR., and
JAMES E. THIERRY, JJ.,
Concur.

Judge Richard B. McQuade, Jr., Fulton County Court of Common Pleas, and Judge James E. Thierry, Ottawa County Court of Common Pleas, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

**OPINION AND JUDGMENT ENTRY OF THE COURT
OF COMMON PLEAS OF LUCAS COUNTY, OHIO**

(Filed July 29, 1985)

Case No. 83-2699

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4117,

Plaintiff,

vs.

SANTA BARBARA FOUNDATION, *et al.*,

Defendants.

OPINION AND JUDGMENT ENTRY

This cause comes before the Court upon the cross-motions of defendant Santa Barbara Foundation and defendant Toledo Trust Company, as Trustee of Trust No. 4118, for summary judgment. The cause was submitted on the pleadings, the written stipulations of fact, and the written memoranda of counsel and attachments thereto. Upon consideration of the same, the Court finds that defendant Toledo Trust's motion is well-taken and is granted in accordance with the principles set forth herein.

The facts as stipulated to by the parties are as follows. On January 28, 1960, Nancy S. Jones, as Donor, entered into two written trust agreements with the Toledo Trust Company as Trustee. Trust No. 4117 was created for the Donor's daughter, Marcia McDonald Rivas (hereafter Rivas trust) and Trust No. 4118 was created for the

Donor's other daughter, Roberta Pawlak (hereafter Pawlak trust). Both trusts granted the beneficiary a testamentary special power of appointment over the corpus of the trust with a gift-over provision in the event the beneficiary failed to effectively exercise the power. In default of appointment, the principal of the Rivas trust was to pass to Ms. Rivas' issue or, if none, to the Pawlak trust.

Marcia McDonald Rivas died on November 10, 1982, a resident of Santa Barbara, California; she left no issue and was survived by her sister, Roberta Pawlak. Ms. Rivas left a Last Will and Testament dated March 14, 1980 which was admitted to probate in the Superior Court of the State of California, County of Santa Barbara, on August 1, 1983. Pursuant to her will, Mr. Rivas acted to exercise her special power of appointment by appointing ten percent (10%) of all property subject to the power of appointment to Alcoholics Anonymous, Santa Barbara, California. Alcoholics Anonymous declined to accept all but \$500.00 of the bequest. The Santa Barbara Foundation subsequently filed a Petition for Determination of Entitlement to Distribution of Estate in the Supreme Court of the State of California, County of Santa Barbara, seeking to be appointed charitable trustee of the declined assets pursuant to the doctrine of cy pres. Hearing on the Petition was set for October 6, 1983 and notice was sent to all persons who may have had an interest in the estate, including the Toledo Trust Company.

On October 13, 1983, the Supreme Court ordered that 10% of the assets of the Rivas trust be distributed to Santa Barbara Foundation, to be held and administered as a charitable trust pursuant to the terms of the Order. Following the ruling, Santa Barbara applied to the Toledo

Trust Company for payment of the funds. Toledo Trust has declined to pay the funds pending the advice and instruction of the Court.

The motions for summary judgment present a number of complex and novel issues to the Court. Defendant Santa Barbara Foundation perceives the critical issue to be the power of the California Court to appoint it as charitable trustee of the disclaimed assets of Alcoholics Anonymous. This position presumes that the exercise of the special power of appointment was effective and that disposition of the disclaimed bequest was to be determined by the intention of Ms. Rivas, a matter of will construction, and therefore, determinable pursuant to California law. Santa Barbara thereby argues that effect should be given to the California proceeding. Alternatively, Santa Barbara maintains that application of Ohio's doctrine of cy pres will yield the same result.

In opposition, defendant Toledo Trust, as Trustee of Trust No. 4118, presents three issues to the Court. First, the defendant argues that the California judgment should not be afforded full faith and credit as it was rendered without jurisdiction over the trust res, the trustee, or the takers in default. Second, Toledo Trust contends that the exercise of the power of appointment was not effective, thereby triggering the gift-over provision and requiring distribution of the disclaimed assets to Trust No. 4118. Finally, the defendant claims that the instant facts do not support the application of the doctrine of cy pres, either under Ohio or California law.

The Court perceives the threshold issue to be the effectiveness of the exercise of the power of appointment. If the exercise was ineffective, the remainder interest of

Trust No. 4118 was not divested and the Court would then be confronted with the issue of the validity of the California judgment. If the exercise of the power was effective, thereby divesting Trust No. 4118 of its remainder interest the jurisdiction of the California court was properly exercised and the judgment entitled to full faith and credit.

It is undisputed that this question is to be determined under the law of the domicile of the donor of the power. *Cleveland Trust Co. v. Shuman*, 68 Ohio Ops.2d 332 (1974); *First Central Trust Co. v. Claflin*, 49 Ohio L. Abs. 29 (1947). Therefore, the effectiveness of the exercise of the power must be determined under the law of Ohio.

The Court has conducted a thorough review of the case law in Ohio and finds itself without guidance on this issue. While the case law has addressed the technical requirements for a valid exercise it has not addressed the effect of an appointee's disclaimer on the exercise of a special power of appointment. Santa Barbara's position is that since Ms. Rivas complied with both the common law requirements necessary for a valid exercise and with the specific terms of the Rivas Trust, the exercise was valid. Defendant Toledo Trust distinguishes between a valid exercise and an effective exercise, arguing that an effective exercise requires an actual transfer of the appointed assets to the donee. Since Alcoholics Anonymous disclaimed all but \$500.00 of the appointed assets, Toledo Trust maintains that the exercise was ineffective and the gift-over provision takes effect.

After careful consideration of the ramifications of both positions, the Court finds the argument of defendant Toledo Trust persuasive. Critical to the Court's decision

is the principle that property over which one has a special power of appointment is considered to be property of the donor of the power; the donee of the power only acts on behalf of the donor. *Cleveland Trust Co. v. McQuade*, 106 Ohio App. 237 (1957). Unless the donee effectively transfers the property to the appointee, ownership remains in the donor; the donee never becomes the owner of the property. Therefore, it appears to this Court that acceptance by the appointee is necessary for the effective transfer of ownership and thereby, for an effective exercise of the power. Accord, *Commissioner v. Cardeza's Estate*, 173 F.2d 19 (3rd Cir. 1949); 5 *Page on Wills* §45.23 (4th ed. 1962); See, 5 A.W. Scott, *The Law of Trusts*, §427 (3rd ed. 1967).

Application of the foregoing to the instant facts requires the Court to conclude that the exercise of the special power of appointment was ineffective, leaving ownership of the assets with the donor. Thus, it is the donor's intent which will guide distribution of the assets and not that of the donee. The donor's intent is clearly evidenced by the gift-over provision which requires distribution of the assets to Trust No. 4118 in the event of default of appointment. Accordingly, the Court finds that the assets disclaimed by Alcoholics Anonymous are to be distributed pursuant to that provision.

In light of the foregoing determination, the Court need not reach the issues of the validity of the California judgment and the applicability of the doctrine of cy pres.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that the motion for summary judgment of defendant Toledo

Trust, as Trustee of Trust No. 4118, is found to be well-taken and is hereby granted.

It is further ORDERED that the assets disclaimed by Alcoholics Anonymous are to be distributed to Trust No. 4118 in accord with provision 3(b)(1) of Trust No. 4117.

It is further ORDERED that the motion for summary judgment of defendant Santa Barbara Foundation is found to be not well-taken and is hereby denied.

/s/ GEORGE M. GLASSER
Judge

**ORDER OF THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO ENFORCING MANDATE**

(Filed November 19, 1987)

Case No. 83-2699

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4117,

Plaintiff,

vs.

SANTA BARABARA FOUNDATION, *et al.*,

Defendants.

ORDER

In accordance with the Mandate entered by the Supreme Court of Ohio on August 26, 1987,

IT IS ORDERED that plaintiff The Toledo Trust Company, as Trustee of Trust No. 4117, after first taking all actions required by law including the payment of legal and other expenses, shall distribute to defendant Santa Barbara Foundation those assets held in Trust No. 4117 appointed to and declined by Alcoholics Anonymous, to be held by Santa Barbara Foundation and administered as a charitable trust in accordance with the final judgment and order *In The Matter of the Estate of Marcia MacDonald Rivas, a/k/a Marcia MacDonald, deceased*, Case No. SM38985, entered by the Superior Court of the State of California, County of Santa Barbara, on October 13, 1983, and

It is further ORDERED that the Motion for Allowance of Costs of Litigation, Including Counsel Fees filed on behalf of defendant The Toledo Trust Company, as Trustee of Trust No. 4118 be denied.

It is further ORDERED that defendant Santa Barbara Foundation recover its costs expended herein.

/s/ FREDERICK H. McDONALD
Judge

**JUDGMENT ENTRY OF THE SUPREME COURT
OF OHIO**

(Dated August 26, 1987)

Case No. 86-1064

THE SUPREME COURT OF OHIO
COLUMBUS

TOLEDO TRUST COMPANY, TRUSTEE OF
TRUST NO. 4117,
Appellee,

v.

SANTA BARBARA FOUNDATION *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Lucas County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and the cause is remanded to the trial court for further proceedings consistent with the opinion rendered herein.

It is further ordered that the appellants recover from the appellee their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Lucas County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

/s/ THOMAS J. MOYER
Chief Justice

MANDATE OF THE SUPREME COURT OF OHIO

(Filed August 26, 1987)

Case No. 86-1064

THE SUPREME COURT OF OHIO
COLUMBUS

TOLEDO TRUST COMPANY, TRUSTEE OF
TRUST NO. 4117,
Appellee,

v.

SANTA BARBARA FOUNDATION *et al.*,
Appellants.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Lucas, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed and the cause is remanded to the trial court for further proceedings consistent with the opinion rendered herein.

COSTS:

Motion Fee, \$20.00, paid by B. Thomas Handwork, Jr.

/s/ THOMAS J. MOYER
Chief Justice

**ENTRY OF THE SUPREME COURT OF OHIO
DENYING REHEARING**

(Dated October 7, 1987)

Case No. 86-1064

**THE SUPREME COURT OF OHIO
COLUMBUS**

**TOLEDO TRUST COMPANY, TRUST NUMBER 4117,
*Appellee,***

v.

**SANTA BARBARA FOUNDATION, *et al.*,
*Appellants.***

REHEARING ENTRY

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

**/s/ THOMAS J. MOYER
Chief Justice**

**COMPLAINT FILED IN THE COURT OF COMMON
PLEAS OF LUCAS COUNTY, OHIO**

(Filed November 3, 1983)

No. 83-2699

**IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO**

**THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4117**

Three SeaGate
Toledo, Ohio 43603

Plaintiff

v.

**SANTA BARBARA FOUNDATION
Santa Barbara, California**

**ALCOHOLICS ANONYMOUS
CENTRAL OFFICE
1216 State Street**

Santa Barbara, California 93101

**HON. ANTHONY J. CELEBREEZE, JR.
Attorney General, State of Ohio
30 E. Broad Street
Columbus, Ohio 43215**

**THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4118**

Three SeaGate
Toledo, Ohio 43603; and

**NANCY S. JONES
1565 Meadow View Lane
Reno, Nevada 89509**

Defendants.

COMPLAINT

Donald F. Melhorn, Jr. (5895)
Marshall & Melhorn
1400 National Bank Building
Toledo, Ohio 43604
(419) 243-4200
Attorney for Plaintiff

1. Plaintiff The Toledo Trust Company, an Ohio banking corporation authorized to exercise trust powers, is Trustee of a trust carried on its records as Trust No. 4117, established by written Trust Agreement dated January 28, 1960 between defendant Nancy S. Jones as Donor and plaintiff as such Trustee, a copy of which Trust Agreement is here attached as Exhibit A. The situs of said Trust and the locus of its administration are at plaintiff's office in Toledo, Lucas County, Ohio.

* * * * *

5. In its separate and distinct capacity as defendant herein, The Toledo Trust Company is Trustee of another and different trust, carried on its records as Trust No. 4118.

* * * * *

10. On September 16, 1983 defendant Santa Barbara Foundation filed in the Superior Court of the State of California, County of Santa Barbara, a "Petition for Determination of Entitlement to Distribution of Estate." In said Petition, docketed under No. SM 38985 of the records of said Superior Court, defendant Santa Barbara Foundation alleged that defendant Alcoholics Anonymous, Central Office, had declined as aforesaid, and prayed that said Superior Court determine who is entitled to assets of Trust

No. 4117 which, but for said declination, would have passed to said defendant Alcoholics Anonymous, Central Office, pursuant to the aforesaid terms of paragraph (I), Article SIXTH of the Will of Marcia MacDonald Rivas. Plaintiff made no appearance in the aforesaid Superior Court in response to said "Petition," or in any proceedings held in respect thereto.

* * * * *

**ANSWER OF SANTA BARBARA FOUNDATION
FILED IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO**

No. 83-2699

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117

Three SeaGate
Toledo, Ohio 43603

Plaintiff,

vs.

SANTA BARBARA FOUNDATION

Santa Barbara, California

ALCOHOLICS ANONYMOUS
CENTRAL OFFICE

1216 State Street

Santa Barbara, California 93101

HON. ANTHONY J. CELEBREEZE, JR.

Attorney General, State of Ohio

30 E. Broad Street

Columbus, Ohio 43215

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4118

Three SeaGate
Toledo, Ohio 43603; and

NANCY S. JONES
1516 Meadow View Lane
Reno, Nevada 89509

Defendants.

SANTA BARBARA FOUNDATION,
Santa Barbara, California,
Cross-Complainant,

vs.

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4118

Three SeaGate
Toledo, Ohio 43603

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117

Three SeaGate
Toledo, Ohio 43603

ALCOHOLICS ANONYMOUS
CENTRAL OFFICE

1216 State Street
Santa Barbara, California 93101

HON. ANTHONY J. CELEBREEZE, JR.

Attorney General, State of Ohio
30 E. Broad Street
Columbus, Ohio 43215

NANCY S. JONES
1516 Meadow View Lane

Reno, Nevada 89509

Cross-Defendants.

ANSWER TO COMPLAINT AND CROSS COMPLAINT

Robert L. Bletcher, Esq.
8 E. Figueroa St., Ste. 210
Santa Barbara, CA 93101
(805) 965-1016
Attorney for Defendant,
Santa Barbara Foundation

COMES NOW DEFENDANT, SANTA BARBARA FOUNDATION, and answers the Complaint herein as follows:

1. Defendant, SANTA BARBARA FOUNDATION, admits allegations 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Plaintiff's Complaint.

* * * * *

**ANSWER OF TRUST NO. 4118 FILED IN THE
COURT OF COMMON PLEAS OF LUCAS
COUNTY, OHIO**

Case No. 83-2699

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117
Plaintiff

v.

SANTA BARBARA FOUNDATION, *et al.*
Defendants.

ANSWER OF THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4118 and OF DEFENDANT
NANCY S. JONES

and

COUNTERCLAIM and CROSS-CLAIM OF DEFENDANT
THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4118

James J. Robison (7434)
Robison, Curphey & O'Connell
425 L-O-F Building
Toledo, Ohio 43624
(419) 255-3100

Attorney for Defendants Nancy S.
Jones and The Toledo Trust Com-
pany, as Trustee of Trust No. 4118.

Defendant The Toledo Trust Company, as Trustee of Trust No. 4118 ("Defendant Trustee"), and Defendant Nancy S. Jones:

1. Admit the allegations of paragraphs 1 through 12 of the Complaint.

* * * * *

**STIPULATIONS AND ATTACHED EXHIBITS FILED
IN THE COURT OF COMMON PLEAS OF LUCAS
COUNTY, OHIO**

(Dated April 24, 1985)

No. 83-2699

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4117,

Plaintiff,

v.

SANTA BARBARA FOUNDATION, *et al.*,
Defendants.

STIPULATIONS

Plaintiff The Toledo Trust Company as Trustee of Trust No. 4117 and defendants Santa Barbara Foundation, The Toledo Trust Company as Trustee of Trust No. 4118 and Nancy S. Jones, by and through counsel, do hereby stipulate to the facts set forth below. Where the Defendants could not agree on language to be included in the Stipulations below, Defendant Santa Barbara Foundation's suggested phrasing is enclosed in parentheses () and Defendants The Toledo Trust Company as Trustee of Trust No. 4118 and Nancy Jones' suggested phrasing is enclosed in brackets [].

1. On January 28, 1960, Nancy S. Jones, as Donor, entered into a written Trust Agreement with The Toledo Trust Company, as Trustee, carried on its records as Trust

No. 4117. The primary beneficiary of said Trust Agreement is Donor's daughter, Marcia McDonald Rivas, who was granted a testamentary special power of appointment over the corpus of the trust. A copy of the Trust Agreement, attached hereto and identified as Exhibit A, is a true, accurate and genuine copy of said Trust Agreement.

2. The said Trust Agreement was entered into in Ohio, which is also the situs of the trust assets and administration of the trust.

3. Marcia McDonald Rivas died on November 10, 1982 a resident of Santa Barbara, California.

4. Marcia McDonald Rivas left a Last Will and Testament dated March 14, 1980 which Will was admitted to probate in the Superior Court of the State of California, County of Santa Barbara, on August 1, 1983. A copy of the Last Will and Testament of Marcia McDonald Rivas, attached hereto and identified as Exhibit B, is a true, accurate and genuine copy of said Will.

5. Alcoholic Anonymous, 1216 State Street, Santa Barbara, California, previously located at 1129 State Street, Santa Barbara, California, has declined to accept (a bequest) [the appointment] of 10% of the trust corpus as provided in the Last Will and Testament of Marcia McDonald Rivas in excess of the sum of \$500.00. A copy of Alcoholics Anonymous' Declaration of Declination of Bequest and Appointive Assets, attached hereto and identified as Exhibit C, is a true, accurate and genuine copy of said Declination.

6. On September 16, 1983 Santa Barbara Foundation of California filed a Petition for Determination of Entitlement to Distribution of Estate in the Superior Court of the State of California, County of Santa Barbara, Case

No. SM38985. A copy of the Petition for Determination of Entitlement to Distribution of Estate, attached hereto and identified as Exhibit D, is a true, accurate and genuine copy of said Petition.

7. Toledo Trust Company, attn: Gerald W. Miller (was served with) [received] notice of the time and place of hearing on the Petition for Determination of Entitlement to Distribution of Estate. A copy of the Notice of Hearing and Proof of Service by Mail, attached hereto and collectively identified as Exhibit E, is a true, accurate and genuine copy of said Notice of Hearing and Proof of Service by Mail.

8. On October 13, 1983 the Superior Court of the State of California, County of Santa Barbara, made and Entered an Order Determining Entitlement to Distribution of Estate directing that 10% of the assets of the trust over which Marcia McDonald Rivas had a testamentary special power of appointment be distributed to Santa Barbara Foundation to be held and administered as a charitable trust. A copy of the Order determining Entitlement to Distribution of Estate, attached hereto and identified as Exhibit F, is a true, accurate and genuine copy of said Order.

9. Santa Barbara Foundation is a non-profit corporation incorporated in the State of California on September 19, 1928, organized solely for general charitable and eleemosynary purposes. A copy of the Articles of Incorporation of Santa Barbara Foundation, together with an Amendment thereto, attached hereto and collectively identified as Exhibit G, is a true, accurate and genuine copy of said Articles.

10. After obtaining the California Order, Santa Barbara Foundation (applied to The Toledo Trust Company

as Trustee of Trust No. 4117 for payment of the funds allocable to Alcoholics Anonymous, pursuant to) [gave notice to The Toledo Trust Company as Trustee of Trust No. 4117 of the entry of] the Order Determining Entitlement to Distribution of Estate.

11. The Toledo Trust Company as Trustee of Trust No. 4117 has not paid to Santa Barbara Foundation the funds allocable to Alcoholics Anonymous as directed by the Order Determining Entitlement to Distribution of Estate and continues to hold said funds pending receipt of the advice and instruction of this Court.

/s/ DONALD F. MELHORN, JR.

*An Attorney for Plaintiff The
Toledo Trust Company as Trustee
of Trust No. 4117*

/s/ JOHN M. CAREY

*An Attorney for Defendant Santa
Barbara Foundation*

/s/ JAMES J. ROBISON

*An Attorney for Defendants Nancy
S. Jones and The Toledo Trust
Company as Trustee of Trust
No. 4118*

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Stipulations have been served upon Donald F. Melhorn, Jr., Esq., 4 SeaGate, 8th Floor, Toledo, Ohio 43604, Attorney for Plaintiff The Toledo Trust Company as Trustee of Trust No. 4117; Robert L. Bletcher, Esq., 8 East Figueroa Street, Suite 210, Santa Barbara, California 93101, Attorney for Defendant Santa Barbara Foundation; Defendant, Alco-

holics Anonymous, Central Office, 1216 State Street, Santa Barbara, California 93101; Janice M. Wood, Assistant Attorney General, State of Ohio, 30 East Broad Street, Columbus, Ohio 43215; and James J. Robison, Esq., 4 SeaGate, 9th Floor, Toledo, Ohio 43604, Attorney for Defendants Nancy S. Jones and The Toledo Trust Company as Trustee of Trust No. 4118, by ordinary U. S. Mail this 24th day of April, 1985.

JOHN M. CAREY

Exhibit A

TRUST NO. 4117
TRUST AGREEMENT

AGREEMENT entered into on the 28th day of January, 1960 between NANCY S. JONES (hereinafter called the "Donor"), and THE TOLEDO TRUST COMPANY (hereinafter called the "Trustee").

The Donor has assigned, transferred, conveyed and delivered and does hereby assign, transfer, convey and deliver to the Trustee the property described in Schedule "A" attached hereto and made a part hereof, which together with such other property as may hereafter be added to the trusts hereunder as hereinafter provided in Article I, shall be held by the Trustee in trust for the uses and purposes herein set forth.

ARTICLE I
ADDITIONS TO THE TRUST

The Donor or any other person or persons (either before or after the death of the Donor) may at any time and from time to time increase or add to the trust assets by gifts, devises, bequests, conveyances, transfers, assignments or deliveries of property, real or personal, to the Trustee to be held in trust for the uses and purposes herein set forth, and the Trustee is authorized and empowered to accept and receive such property and to hold the same in trust for the uses and purposes herein set forth.

ARTICLE II
BENEFICIARIES

The primary beneficiary of this trust is the Donor's daughter, Marcia. Income and principal shall be distributed as follows:

(1) During the life of the Donor's said daughter, the Trustee may, from time to time, in its discretion, pay to her or to any one or more among her issue such part of the income and/or principal as it deems necessary, advisable or expedient for the care, comfort, support, best interest or general welfare of Donor's daughter, or for the care, comfort, support, education, best interest or general welfare of any one or more of her issue. Such payments may be made to or for the benefit of any one or more to the exclusion of the other or others among said beneficiary, and her issue, if any, and without obligation to make equal payments to any of the others then or thereafter. Income not so paid shall be accumulated and added to principal. If at any time all of the then existing principal is distributed by the Trustee, this trust shall terminate.

(2) Upon the death of the Donor's said daughter, the then existing principal shall be distributed to such one or more among her issue, spouses (including widows and widowers) of such issue, sister, sister's issue, and any institutions or associations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, in such shares or proportions and upon such terms, conditions and estates in trust or otherwise, as the Donor's said daughter may by her Last Will and Testament appoint, provided that her said Will shall expressly refer to her power of appointment hereunder,

and provided further that such power of appointment shall not be exercisable in favor of the Donor's said daughter, her estate, her creditors or the creditors of her estate.

(3) To the extent the Donor's daughter fails effectively to exercise the power of appointment granted to her in the preceding paragraph (2), at the time of her death the then existing principal (including accumulated income) shall be held or distributed as follows:

(a) If the Donor's daughter leaves issue living at the time of her death, such principal shall vest per stirpes in and, subject to the provisions of paragraph (4) hereof, be distributed to such of her issue as are living at that time;

(b) If said daughter leaves no issue living at the time of her death, then such principal shall be distributed as follows:

(i) If the Donor's daughter, Roberta, is living at that time, it shall be added to and become a part of the trust created simultaneously herewith for the benefit of the Donor's daughter, Roberta, with the Toledo Trust Company as Trustee and designated on the Trustee's records as Trust No. 4118 and shall be administered and distributed in accordance with the provisions thereof; or, if she has died prior thereto leaving issue living at that time, then it shall vest per stirpes in and, subject to the provisions of paragraph (4) hereof, be distributed to such of her issue as are living at that time;

(ii) If the Donor's daughter, Roberta, has died prior thereto leaving no issue living at that

time, then subject to the provisions of paragraph (4) hereof, it shall be distributed in equal shares to such of the children of the Donor's brothers and sisters (including half-brothers and sisters and step-brothers and sisters) as are living at that time, except that if any such child has died prior thereto leaving issue living at that time, the share to which such deceased child would have been entitled if living shall vest per stirpes in and be distributed to such of the deceased child's issue as are living at that time.

(4) If any share or part of principal becomes distributable to any beneficiary who has not attained the age of twenty-one (21), the Trustee shall have full power and authority, in its sole discretion, to retain such part or share until such beneficiary shall attain said age. This power of retention shall operate as a power only and shall not operate to prevent the vesting of any interest or to suspend the ownership thereof. With respect to the administration of any such share or part during the period of retention, the Trustee shall have full power and authority to exercise all of the rights, powers and discretions of management and administration of trust assets herein conferred upon it and to pay to such beneficiary or apply to his or her use such part of the income and/or principal of his or her share or part as it may deem necessary, advisable or expedient for the care, comfort, support and education of such beneficiary. Any income not so paid or applied shall be accumulated and added to the principal of the share or part from which derived. If such beneficiary dies before attaining the age of twenty-one (21), the share or part so retained shall be delivered and paid over to the estate of such beneficiary.

(5) Whenever income and/or principal is to be distributed, paid to or applied to the use of any beneficiary under the age of twenty-one (21), such payment or distribution may be made for the benefit of such minor to either or both of such minor's parents or guardian or to the person with whom such minor is living or may be applied to the use of such minor by the Trustee by expending it for his or her benefit.

(6) The terms "child," "children," "issue," and any similar term or terms as used herein, shall include any adopted child or children and any such adopted child or children and the issue thereof shall be entitled to share hereunder in the same manner as if born in lawful wedlock to the adopting parent or parents.

ARTICLE III

PROHIBITION AGAINST ALIENATION

(1) No beneficiary shall have the right to transfer all or part of his interest either in income or principal unless the Trustee, in its discretion (which it shall not be compelled to exercise), shall consent in writing thereto; nor shall any person having a claim or demand of any sort against a beneficiary have the right, while the Trustee has possession of any trust property, to reach the interest of any beneficiary therein by judicial process.

(2) If any beneficiary, without first obtaining the Trustee's written consent (which the Trustee shall not be compelled to give), shall attempt at any time or times to transfer all or any part of his interest in the income or principal, or, if any person having a claim or demand

of any sort against any beneficiary attempts at any time or times to reach the interest of such beneficiary by judicial process for the purpose of having all or any part of such interest applied or paid over, or impressed with a charge or lien in complete or partial satisfaction of such claim or demand, then in any such event, from that time forward and until (as the case may be) the attempted transfer is cancelled and revoked or the claim or demand is finally settled and disposed of, the right of the beneficiary to demand either income or principal, or both, to which he would otherwise be entitled, shall cease; and during such time, the income, or principal, or both, to which the beneficiary would otherwise be entitled, shall be held or distributed in any one or more of the following ways:

(a) All or any part of such income may be accumulated; or

(b) All or any part of such income, accumulated income and principal may, from time to time, be paid to or applied to the use of all or any one or more exclusively of the other or others among such beneficiary, such beneficiary's spouse, if any, and such beneficiary's issue, if any; or, if there is no such spouse or issue, then among such beneficiary and the person who would, if such beneficiary were actually dead, be entitled to such income, accumulated income, or principal, as the case may be;

as the Trustee, in its absolute and uncontrolled discretion (which it shall not be compelled to exercise and for the exercise of which it shall not be liable to account) thinks fit. If such beneficiary dies during the time when the Trustee is holding in trust any property subject to

the provisions of this paragraph, any accumulated or undistributed income shall thereupon be added to the principal thereof, and such property shall thereafter be held and distributed as hereinbefore provided; and if no provision has been made for the disposition of such property after such beneficiary shall have attained any specified age and such beneficiary had in fact attained such age at the time of death, the age of such beneficiary at the time of death shall, for the purpose hereof, be deemed to be less than the specified age. The foregoing provisions of this paragraph shall in all events be subject to the limitation that, if the Trustee is holding in trust any property subject thereto on the day preceding the expiration of a period of twenty-one (21) years after the death of the survivor of all beneficiaries of any trust hereunder who are in being at the time of the creation of the interests hereunder, then the trust shall terminate on said day, and any then existing principal and undistributed income shall vest in and be distributed to the beneficiary or beneficiaries who, without regard to the provisions of this paragraph, are entitled thereto upon termination.

(3) If any provision of this Article or the application thereof to any person, interest or circumstance is held invalid, the remainder of the Article and the application of such provision to other persons, interests or circumstances shall not be affected thereby.

ARTICLE IV

ADVISORY COMMITTEE

There is hereby established hereunder an Advisory Committee which shall consist of R. A. Stranahan, Jr., W. A. Belt and S. J. Balog, and their successors, chosen as herein provided, and which shall have the rights and

powers herein set forth. Such rights and powers shall be held by the Advisory Committee in a fiduciary capacity and shall be exercised by them for the benefit of the beneficiaries and others interested in the trust in all respects as though the same were exercised by trustees hereunder, and not for the benefit of any other person or persons.

(1) The Trustee of each of the trusts created herein shall exercise its powers of sale, investment, reinvestment, borrowing and voting of shares or other securities in accordance with the written directions of the Advisory Committee. The Committee by unanimous consent of its members shall have the right and power to remove the Trustee of any trust and appoint a successor or successors as hereinafter set forth. The written consent or ratification of the Advisory Committee shall have the same force and effect as a written direction. The Trustee shall not be liable for nor charged with any act or thing done or omitted to be done in good faith and upon the direction or with the consent or ratification of the Advisory Committee. If in any case of emergency it is either impossible or impracticable or inexpedient to obtain the direction of such Committee, then the Trustee may, until the passing of such emergency, exercise said powers without the direction, consent or ratification of said Committee.

(2) Except where unanimous consent is otherwise expressly required herein, the Committee shall act by consent of a majority of the members. If at any time there is an equal division of opinion between the members, the Trustee shall determine the matter in question. Any one or more of the members may, from time to time, but not permanently, delegate the rights and powers conferred upon such member or members to any other

person or persons. No member of the Advisory Committee shall be liable for any act or thing done or omitted to be done in good faith nor for any error or mistake of judgment.

(3) Any member may resign by giving written notice to the other members of the Committee, if any, and to the Trustee. Upon the death, resignation, incapacity or refusal to serve of any member, a successor may be appointed by the remaining members of the Committee to the end that there shall always be at least two and not more than three members of the Committee. Any successor member shall have the same rights and powers as though originally designated herein.

(4) At any time the Advisory Committee may terminate its existence by unanimous consent of its members. Upon such termination, all of the rights, powers and discretions of the Committee shall forthwith vest in and thereafter be exercised by the Trustee as fully and effectually as if originally conferred upon the Trustee solely.

(5) The fiduciary powers herein conferred upon the Advisory Committee shall be held to be naked powers and shall not vest any member or members thereof with any right, title or interest in or to any of the trust assets, and the Trustee shall have the sole power and authority to execute, acknowledge and deliver all deeds, leases, conveyances, assignments, bills of sale, receipts, proxies, transfers, agreements or other instruments affecting the trust assets, including any court applications or accounts and none of the members of said Committee shall be permitted or required to join therein. No person, firm or corporation dealing with the Trustee shall be privileged or obligated to inquire into the authority of the Trustee or of the

said Committee, or into the fact whether any act or transaction shall have been directed, consented to or ratified by such Committee. No bond or other security shall be required of any member of the Advisory Committee.

ARTICLE V

POWERS AND DUTIES OF THE TRUSTEE

Pursuant to the directions or with the consent of the Advisory Committee as hereinbefore provided, the Trustee shall have full power and authority, with respect to each separate trust, to control and manage the trust assets, to collect, recover and receive the rents, issues, interest, income and proceeds therefrom and to do all acts and things which it deems either necessary, advisable or expedient to the same extent and with like effect as might be done by an individual in absolute ownership and control of said property, including (without prejudice to the generality of such powers) the following powers:

(a) The Trustee, without liability for depreciation or loss thereof, may hold and retain any real or personal property in the same form of investment as that in which it was received hereunder, although such property may not be of the character of investment permitted by law to trustees, and regardless of the fact that the holding or retention thereof may be unwise, imprudent or hazardous or that such property may be non-productive and regardless of the proportion which any such property, or property of a similar character, so held, may bear to the entire amount of the trust estate.

(b) The Trustee may sell, convey, exchange, mortgage, pledge, option, lease for any term of years

irrespective of the period of any trust hereunder and with or without privilege or option to purchase (including 99-year leases renewable forever), renew, extend, continue or modify any such transaction or otherwise deal in and dispose of all or any part of the trust assets without order of court, at public or private sale, for cash or on credit, for such consideration, and on such terms and conditions as the Trustee, in its discretion, may deem either necessary, advisable or expedient. The Trustee shall have the right and power, at any time and from time to time, to purchase from, sell to, and otherwise deal with itself in its capacity as fiduciary of any other trust in which any member of the Donor's family has a beneficial interest, to the same extent as it is herein authorized to purchase from, sell to and deal with third parties.

(c) The Trustee is authorized and empowered to borrow money from itself or from any other person or persons or to create, incur or assume debts or obligations for any purpose or purposes it may, in its discretion, deem either necessary, advisable or expedient including, but not limited to, that of paying or applying income and/or principal to any beneficiary or beneficiaries when cash is not available or saving, protecting, preserving, repairing or improving any trust asset, paying debts, claims, obligations, taxes, assessments or other governmental charges, or any and all other costs, charges or expenses incurred in the management and administration of the trusts or acquiring or purchasing investments, and to secure the payment therefor by mortgaging, pledging, hypothecating or otherwise encumbering all or any part of the income and/or principal then held or there-

after acquired, executing negotiable or non-negotiable notes, purchase-money mortgages, assuming debts or obligations of others, or otherwise; the Trustee may advance or loan money to any person or persons, or deposit the same in any bank or trust company, for any purpose and for any length of time it deems either necessary, advisable or expedient with or without security.

The Trustee may advance or loan money to any trust and shall have a first and prior lien upon all of the income and principal of such trust with the right to fully repay and reimburse itself out of either or both income and principal, and in addition thereto, the Trustee shall be entitled to specific security by way of a mortgage or pledge of particular parts of the income and/or principal in such trust for all sums so loaned or advanced. The Trustee shall be entitled to receive a legal rate of interest on any money so advanced or loaned.

(d) The Trustee shall have full power and authority to execute, acknowledge and deliver all deeds, conveyances, bills of sale, assignments, receipts, powers of attorney, proxies, contracts, notes, mortgages, leases, options, transfers and other instruments which it, in its discretion, deems either necessary, advisable or expedient.

(e) The Trustee may change and alter investments and invest and reinvest the trust funds in such real or personal property of any kind or description as the Trustee may deem either necessary, advisable or expedient. The Trustee shall not be restricted to investments or reinvestments of the character permitted for trustees' investments by the rules or orders

of court or the statutes of the State of Ohio or of any other state, but shall be relieved from all restrictions placed by law on investments which may be made by trustees. The Trustee shall not be held to account or liable for, nor charged with, any loss due to alterations, changes, investments or reinvestments made or omitted to be made pursuant to the directions of the Advisory Committee, or, if acting in its sole discretion, made or omitted to be made in good faith and with due care.

(f) With respect to any shares of stock or bonds or other securities held by it, the Trustee is authorized and empowered, in its discretion, to vote thereon in person or by proxy (to whom discretion may be granted); to consent in writing and join in any voting trust, pooling or depository agreement with respect thereto; to exercise any right of option, subscription, conversion or otherwise attaching to or which may be given to the holders thereof; to join in any plan of lease, mortgage, consolidation, exchange, reorganization or foreclosure of any corporation issuing the same and take and hold any security issued under any such plan, pay assessments involved therein or invest additional funds therein; and to exercise all other rights in connection therewith as fully as if such Trustee were the unqualified owner thereof.

(g) The Trustee shall not be required to register or hold any real or personal property, including without limiting the generality of the foregoing, stocks, bonds or other securities or other investments or instruments appertaining thereto, in its name individually or as Trustee, but may register, hold or retain such property and/or instruments in the name of an

individual, partnership or corporation as its nominee or may keep them unregistered any may retain them or any part thereof in such condition that they may pass by delivery.

(h) The Trustee may, in its discretion, allocate all or any part of the receipts, actual or constructive, including but not limited to rents, capital gain, interest or dividends in cash, stock or property, to income or to principal, or to both and may, in its discretion, charge all or any part of the current or other expenses, disbursements, losses, premiums and discounts, to income or to principal or to both.

(i) The Trustee shall be under no obligation to create a sinking fund or make any amortization charge from income or otherwise to make good to principal any loss on securities received at a valuation above par, or purchased by it above par, when from falling due of said securities or otherwise, the premium is lost in whole or in part.

(j) Whenever it shall become necessary to divide any assets into parts or shares or to distribute the same, the Trustee may, but shall not be required to, reduce all or any part thereof to cash or other divisible form, and may make such division or distribution in cash or in kind, or partly in cash or partly in kind (as may be determined by the Trustee), and for the purpose of each division or distribution, the judgment of the Trustee concerning the property thereof, and the relative value for the purpose of division or distribution of the property and security so divided or distributed shall be binding and conclusive on all persons interested therein.

(k) The Trustee shall have full power and authority to sue for, settle, collect and compound, sell or abandon claims or demands belonging to any of the trusts, to accept any consideration, compensation or security for any debts and to allow such time for payment (either with or without taking any security), and to defend, settle, adjust, compromise, pay or discharge any claim of whatever kind which may be made against any of the trusts, upon such terms and conditions and in such manner, as to the Trustee, in its discretion, may seem either necessary, advisable or expedient.

(l) The Trustee may, in its discretion, pay all taxes, assessments or governmental charges of any nature whatsoever, which shall become payable in respect of all or any part of the income or principal held in any of the trusts hereunder at any time and from time to time, or which shall become payable in respect to all or any part of the income and/or principal of any of the trusts which is accumulated, or paid to, or applied to the use of or distributed to any beneficiary or beneficiaries.

The Trustee, in its discretion, may contest any tax, assessment or governmental charge and may pay the costs and expense of such contest including interest and penalties if any are charged out of the income and/or principal and without liability on its part notwithstanding it may be held that the Trustee contested any such tax, assessment or governmental charge without reasonable cause. The Trustee shall not be liable to any beneficiary for its failure or omission to pay any taxes, assessments or governmental charges of any nature.

(m) The Trustee may in the discharge of its duties employ and compensate counsel, agents or other representatives. The Trustee shall not be answerable for the default or misconduct of any counsel, agent or other representative selected by it in good faith.

(n) The Trustee shall keep adequate books of account in which shall be entered a description of all property from time to time constituting the trust assets and an account of all receipts and disbursements hereunder, which books of account shall at all times be open to the inspection and examination of the Advisory Committee, beneficiaries and guardians of any minor beneficiaries, at least annually, and as often as may reasonably be requested, during the life of the trust hereby created, an accurate statement showing the property constituting the trust assets and the income thereof, and showing all receipts and disbursements.

The Trustee shall not be required to file any account in or report to any court under or pursuant to any statute now in force or hereafter enacted, nor shall the Trustee be required to account or report otherwise than as herein provided or as required by the orders and decrees of a court of competent jurisdiction.

(o) No purchaser, mortgagee, pledgee or assignee of any part or all of the trust assets, nor any person borrowing from or lending to the Trustee, nor any other person or persons whether or not they are dealing with the Trustee, shall be required or permitted to see to the application of any trust funds, or the

performance of any duty, or be obligated or privileged to inquire into the power or authority of the Trustee or into the necessity, advisability or expediency of any act of the Trustee.

(p) The Trustee shall be entitled to reasonable compensation for its services; and shall be entitled to be indemnified or reimbursed out of principal and/or income for all payments, outlays, costs, charges and expenses, including attorney fees which it incurs or pays or for which it may become personally liable or required to personally pay, because of breach of contract, injury to person or property, fines, penalties or assessments under any law or otherwise, or any other act or thing done or omitted to be done, in good faith.

ARTICLE VI

THE TRUSTEE

The Trustee and any successor may resign as Trustee by giving thirty (30) days' written notice to the Advisory Committee or, if it is not in existence, to such as are living among the Donor, and Donor's children who have attained the age of twenty-one (21).

The Trustee and any successor may be removed as Trustee of any trust by thirty (30) days' written notice signed by the Advisory Committee.

In the event of the resignation or removal or the refusal or incapacity of the Trustee or any successor to serve as Trustee of any trust, a successor shall be appointed by an instrument in writing signed by the Advisory Committee, or, if it is not in existence, by such

as are living among the Donor, and Donor's children who have attained the age of twenty-one (21), or, if they fail to agree, then by order of a court of competent jurisdiction. Any successor shall be a reputable bank or trust company authorized to conduct a trust business under the laws of any state or of the United States. No successor trustee shall be charged with or held responsible for any act or thing done or omitted by any predecessor.

The powers of resignation, removal and appointment granted herein shall be continuing powers and may be exercised at any time and from time to time. Any successor trustee shall be vested with the same and all the rights, powers, discretions, trusts, duties and obligations of its predecessor with like effect as though originally designated herein.

ARTICLE VII

APPLICABLE LAW

This agreement and all of the trust assets held in trust hereunder shall be subject to and held, administered and distributed in accordance with the laws of the State of Ohio.

ARTICLE VIII

IRREVOCABILITY

The Donor relinquishes all right to alter, amend, revoke or terminate this agreement or any of the trusts hereunder.

IN WITNESS WHEREOF, the said Nancy S. Jones has signed this instrument and The Toledo Trust Company

A66

has caused this instrument to be executed by its officers thereunto duly authorized, in duplicate, the day and year first above mentioned.

/s/ NANCY S. JONES

Nancy S. Jones

THE TOLEDO TRUST COMPANY

By /s/ STEPHEN BALOG

Vice President and Trust Officer

Attest: /s/ FRANCIS G. PLETZ

Assistant Secretary

Witnesses:

/s/ GEORGE F. MEDILL

/s/ [Illegible] S. CLAUS

#4117

SCHEDULE "A"

10,000 shares Champion Spark Plug Company common
stock

Rec'd

/s/ F. G. Pletz

A67

Exhibit B

SM38985

FILED
SUPERIOR COURT
DEC 16 1982

Howard C. Menzel, County Clerk
By /s/ (Illegible)
Deputy Clerk

WILL OF
MARCIA MacDONALD RIVAS

I, MARCIA MacDONALD RIVAS, a resident of Santa Barbara County, California, declare that this is my Will.

FIRST: I revoke all Wills and Codicils that I have previously made.

SECOND: I declare that I am married to JUAN RIVAS and all references in this Will to "my husband" are to him. My husband and I are presently separated. I declare that I have no children living or deceased.

THIRD: I declare that all property presently standing in my name and all property which shall stand in my name at the time of my death is my separate property. There exists no property which is the community property of myself and my husband. It is my intention by this Will to dispose of all property over which I have the right of testamentary disposition, including any and all property as to which I may have a testamentary power of appointment.

/s/ M. M. D. R.

FOURTH: It is common knowledge that my family was made financially secure, initially, through the generosity of my grandfather, ROBERT ALLEN STRANAHAN. Most of the wealth which has passed to me and my family has multiplied, leaving my mother, NANCY S. JONES, my sister, ROBERTA PAWLAK, my niece, MARCIA UNĪ, and my nephew, JAMIE PAWLAK, all quite financially secure. Accordingly, except as otherwise specifically provided herein, I have intentionally failed to make provision for them in this Will.

FIFTH: I make the following specific gifts of property:

A. I give my Jaguar automobile to MARCI DE LA TORRE.

B. I give my grandmother's crystal and china to my niece, MARCIA UNI.

C. I give all my animals, including, but not limited to my horses, dogs, cats, and goats, to MARCI DE LA TORRE. I direct that during the period of the administration of my estate, none of my animals shall be destroyed without the approval of a licensed veterinarian. In the event the destruction of any such animal shall be approved by a veterinarian, following destruction the animal shall not be rendered.

D. I give all my jewelry, clothing, household furniture and furnishings, motor vehicles, and other tangible articles of

/s/ M. M. D. R.

a personal nature, or my interest in any such property, not otherwise specifically disposed of by this Will or in any other manner, together with any insurance on the

property, to MARCI DE LA TORRE, LISA DE LA TORRE, and TRINIDAD DE LA TORRE, in equal shares as they shall agree, or as my Executor shall in my Executor's discretion determine if they shall not agree.

SIXTH: Under that certain Trust Agreement entered into January 25, 1960 between my mother, NANCY S. JONES and TOLEDO TRUST COMPANY, I have a special power of appointment. The permissible appointees under this power of appointment are limited to my issue, spouses (including widows and widowers) of such issue, my sister, my sister's issue, and any institutions or associations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes. I exercise this power of appointment by appointing all property subject to this power as follows:

(A) Ten percent (10%) thereof shall be distributed in memory of Dr. Cameron Hall to SAINT JOHN'S HOSPITAL AND HEALTH CENTER, 1328 22nd, Santa Monica, California 90404.

(B) Ten percent (10%) thereof shall be distributed to the MEMORIAL REHABILITATION FOUNDATION, 300 North San Antonio Road, Santa Barbara, California 93110.

/s/ M. M. D. R.

(C) Ten percent (10%) thereof shall be distributed to the CITY OF HOPE, 208 West 8th Street, Los Angeles, California 90014.

(D) Ten percent (10%) thereof shall be distributed to the ARTHRITIS FOUNDATION, 2944 De La Vina Street, Santa Barbara, California 93105.

(E) Ten percent (10%) thereof shall be distributed to LOYOLA MARYMOUNT UNIVERSITY, Loyola Boulevard and West 80th, Los Angeles, California 90045.

(F) Ten percent (10%) thereof shall be distributed to the HEART ASSOCIATION OF SANTA BARBARA COUNTY, 146 East Carrillo Street, Santa Barbara, California 93101.

(G) Ten percent (10%) thereof shall be distributed to the CHILD ABUSE LISTENING MEDIATION, INC. (CALM), P. O. Box 718, Santa Barbara, California 93102.

(H) Ten percent (10%) thereof shall be distributed to the Large Animal Division of the SCHOOL OF VETERINARY MEDICINE, University of California at Davis, California, in memory of Dr. Wheat, who performed admirably every time I called upon him.

(I) Ten percent (10%) thereof shall be distributed to ALCOHOLICS ANONYMOUS, Central Office, 1129 State Street, Santa Barbara, California 93101.

/s/ M. M. D. R.

(J) Five percent (5%) thereof shall be distributed to the MULTIPLE SCLEROSIS SOCIETY, Channel Islands Chapter, 1727 State Street, Santa Barbara, California 93101.

(K) Five percent (5%) thereof shall be distributed to the CRIPPLED CHILDREN AND ADULTS EASTER SEAL SOCIETY OF SANTA BARBARA COUNTY, 31 East Canon Perdido, Santa Barbara, California 93101.

SEVENTH: During the period of the administration of my estate, I direct my executor to pay to MARCI DE LA TORRE the monthly sum of \$2,500.00 to provide for

the care and feeding of my animals. MARCI DE LA TORRE shall render itemized monthly accounts with respect to such expenditures made by her from such funds for such purposes and any excess not expended for the care and feeding of such animals shall be returned to my estate.

EIGHTH: I give the resident of my estate to my husband JUAN RIVAS if he survives me and if he does not, to MARCI DE LA TORRE.

NINTH: Except as otherwise provided in this Will, I have intentionally and with full knowledge omitted to provide for my heirs who may be living at the time of my death.

/s/ M. M. D. R.

TENTH: If any devisee, legatee or legal heir of mine, or person claiming through any of them, shall contest this Will or attack or seek to impair or invalidate any of its provisions, or any provisions in any codicil thereto, I specifically disinherit each such person and all legacies, bequests, devisees, and interests given under this Will or in any other manner to such person shall be forfeited and shall augment proportionately the shares of my estate going to such of my devisees and legatees as shall not have participated in such acts.

ELEVENTH: I direct that all estate and inheritance taxes payable as a result of my death, not limited to taxes assessed on property passing under this Will, shall be paid out of the residue of my estate, and shall not be deducted or collected from any legatee, devisee, or beneficiary hereunder.

TWELFTH: I nominate MARCI DE LA TORRE as Executor of this Will. The term "my Executor" as used in this Will shall include any personal representative of my estate.

I further authorize my Executor to sell, with or without notice, at either public or private sale, and to lease any property belonging to my estate, subject only to such confirmation of court as may be required by law.

/s/ M. M. D. R.

I authorize my Executor to invest and reinvest any surplus moneys in my Executor's hands in any kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not limited to, interest-bearing accounts, corporate obligations of every kind, preferred or common stocks, shares of investment trusts, investment companies, mutual funds, or common trust funds, including funds administered by my Executor and mortgage participations, that persons of prudence, discretion, and intelligence acquire for their own account.

I further authorize my Executor either to continue the operation of any business belonging to my estate for such time and in such manner as my Executor may deem advisable and for the best interests of my estate, or to sell or liquidate the business at such time and on such terms as my Executor may deem advisable and for the best interests of my estate. Any such operation, sale, or liquidation by my Executor, in good faith, shall be at the risk of my estate and without liability on the part of my Executor for any resulting losses.

THIRTEENTH: If any part of this Will is held to be void, invalid, or inoperative, I direct that such voidness,

invalidity, or inoperativeness shall not affect any other part of this Will, and that the remainder of this Will shall be carried into effect

/s/ M. M. D. R.

as though such part had not been contained herein.

FOURTEENTH: As used in this Will, the masculine, feminine, or neuter gender, and the singular or plural number shall each be deemed to include the others whenever the context so indicates.

I subscribe my name to this Will this 14 day of March, 1980, at Santa Barbara, California.

/s/ MARCIA MACDONALD RIVAS
Marcia MacDonald Rivas

On the date written below, MARCIA MacDONALD RIVAS declared to us, the undersigned, that this instrument, consisting of nine (9) pages including the page signed by us as witnesses, was her Will and requested us to act as witnesses to it. She thereupon signed this Will in our presence, all of us being present at the same time. We now, at her request, in her presence and in the presence of each other, subscribe our names as witnesses.

Executed on February , 1980, at Santa Barbara, California.

We declare under penalty of perjury that the foregoing is true and correct.

/s/ S. J. Brynah, Jr. residing at 3536 Las Pinas Dr.
Santa Barbara, Ca 93105
/s/ Patricia Wilson residing at 859 N. Patterson
Santa Barbara, CA 93104

Exhibit C

ROBERT L. BLETCHER
Attorney at Law
Eight East Figueroa Street
Suite 210
Santa Barbara, California 93101
Telephone: (805) 965-1016
Attorney for Claimant

SUPERIOR COURT OF THE STATE
OF CALIFORNIA
COUNTY OF SANTA BARBARA

In the Matter of the Estate of)
MARCIA MacDONALD RIVAS, aka) No. SM38985
MARCIA MacDONALD,)
Deceased.)

DECLARATION OF DECLINATION OF BEQUEST
AND APPOINTIVE ASSETS

I, ROBERT E. TABER, on behalf of ALCOHOLICS ANONYMOUS, Twenty Third District Central Steering Committee, 1216 State Street, Santa Barbara, California, previously located at 1129 State Street, Santa Barbara, California, do hereby decline to accept the bequest and appointment of 10% of the assets of that certain trust under Trust Agreement dated January 28, 1960, between NANCY S. JONES, Donor, and the TOLEDO TRUST COMPANY, Trustee, over which MARCIA MacDONALD RIVAS had power of appointment, except the sum of \$500.00.

ALCOHOLICS ANONYMOUS, Santa Barbara, California, has no objection to, nor, in accordance with an ALCOHOLICS ANONYMOUS tradition, can it endorse

the request of SANTA BARBARA FOUNDATION for the distribution of the balance of said assets under said bequest and power of appointment of MARCIA MacDONALD RIVAS for the purposes set forth in its Statement of Interest, and request the Court approve and order the same.

Dated: September 27, 1983.

ALCOHOLICS ANONYMOUS
Twenty-Third District
Central Steering Committee

By: /s/ ROBERT E. TABER
Robert E. Taber
Chairman

A76

Exhibit D

FILED
SUPERIOR COURT
SEP 16 1983

Howard C. Menzel, County Clerk-Recorder
By /s/ (Illegible)

Deputy Clerk

ROBERT L. BLETCHER
Attorney at Law
Eight East Figueroa Street
Suite 210
Santa Barbara, California 93101
Telephone: (805) 965-1016
Attorney for Petitioner

SUPERIOR COURT OF THE STATE
OF CALIFORNIA
COUNTY OF SANTA BARBARA

In the Matter of the Estate of)
MARCIA MacDONALD RIVAS, aka -) No. SM 38985
MARCIA MacDONALD,)
Deceased.)

PETITION FOR DETERMINATION OF ENTITLEMENT
TO DISTRIBUTION OF ESTATE

Petitioner, SANTA BARBARA FOUNDATION, respectfully represents:

1. At all times mentioned herein, Petitioner, SANTA BARBARA FOUNDATION, was, and now is, a corporation duly organized and existing under and by virtue of the non-profit laws of the State of California, having its principal place of business in the County of Santa Barbara, State of California.

2. As more particularly appears from the Articles of Incorporation, Petitioner is incorporated solely for general, charitable eleemosynary purposes. A copy of the Articles of Incorporation of Petitioner is attached hereto, marked Exhibit "A" and made a part hereof.

3. Notice of Death in this matter has been duly published as provided by Law and Letters of Special Administration of the Estate of MARCIA MacDONALD RIVAS, deceased, have been issued to ROBERTA PAWLAK, who at all times herein has been appointed, qualified and acting in such capacity. A Petition for Final Distribution has not been filed herein.

4. The Decedent, MARCIA MacDONALD RIVAS, left estate consisting of real and personal property situated in Santa Barbara County, California.

5. Decedent was the donee of a power of appointment under Trust Agreement dated January 28, 1980, between NANCY S. JONES as Donor and THE TOLEDO TRUST COMPANY as Trustee. Said power of appointment was to be exercised upon the death of said MARCIA MacDONALD RIVAS by her Last Will and Testament, expressly referring to said power of appointment. A copy of said Trust is attached hereto marked Exhibit "B" and made a part hereof.

6. By the terms of the Will of MARCIA MacDONALD RIVAS, dated March 14, 1980, and admitted to probate herein on August 1, 1983, decedent duly exercised said power of appointment by, in part, giving ten percent (10%) of the corpus of the Trust over which she had power of appointment to ALCOHOLICS ANONYMOUS, Central Office, 1129 State Street, Santa Barbara, California 93101.

7. Petitioner is informed and believes and on such information and belief alleges that ALCOHOLICS ANONYMOUS is an association of individuals who, as a unit, have the exclusive charitable and educational purpose of deterring the excessive use of alcohol and aiding, assisting, and benefiting persons suffering from alcoholism and the effects of alcohol abuse.

8. Petitioner is informed and believes and on such information and belief alleges that ALCOHOLICS ANONYMOUS is not a duly constituted organization under the laws of the State of California, and does not qualify under Probate Code §27 as a person or organization capable of taking a testamentary disposition by Will.

9. Petitioner is further informed and believes and on such information and belief alleges that ALCOHOLICS ANONYMOUS is unable to accept the assets appointed to it under the Will of Decedent.

10. Petitioner is informed and believes and on such information and belief alleges that in order to carry out the intent of MARCIA MacDONALD RIVAS, deceased, and fulfill the purpose of the bequest and power of appointment exercised under her Will to ALCOHOLICS ANONYMOUS, said gift should be made payable to Petitioner for the use and benefit of persons suffering from alcoholism or the effects of alcohol abuse for Petitioner to hold said gift in charitable trust for the use and benefit of organizations whose primary purpose is to aid, assist, educate, and otherwise benefit persons suffering from alcoholism or the effects of alcohol abuse.

11. Petitioner is informed and believes and on such information and belief alleges that various persons and organizations claim an interest in the Estate of Decedent

and the property in trust subject to Decedent's power of appointment; the rights of persons so claiming have not been determined by any judgment, order, or decree of any court of competent jurisdiction.

12. The names, relationships and addresses of the heirs of the Decedent and of all persons entitled to notice of the time and place of hearing of this Petition, so far as known to Petitioner are as follows:

Name & Relationship

NANCY G. JONES, mother

Age

adult

Residence/mailling address

1565 Meadow View Lane
Reno, NV 89509
46615 Eldorado Drive
Indial Wells, CA 91260

Name & Relationship

ROBERTA PAWLAK, sister

Age

adult

Residence/mailling address

24650 Park Miramar
Calabasas Park, CA 91302
c/o Arthur Weiss, Esq.
7051 Santa Monica Blvd.
Los Angeles, CA 90038

Name & Relationship

MARCIA UNI, niece

Age

adult

Residence/ mailing address

2355 Plum Street
San Diego, CA 92106

Name & Relationship

JAMIE PAWLAK, nephew

Age

adult

Residence/ mailing address

24650 Park Miramar
Calabasas Park, CA 91302

Name & Relationship

MARCI DE LA TORRE, stranger

Age

adult

Residence/ mailing address

c/o MacDonald Thoroughbred Farm
Figueroa Mountain Road
Los Olivos, CA 93441

Name & Relationship

LISA DE LA TORRE, stranger

Age

16

Residence/ mailing address

c/o MacDonald Thoroughbred Farm
Figueroa Mountain Road
Los Olivos, CA 93441

A81

Name & Relationship

TRINIDAD DE LA TORRE, stranger

Age

13

Residence/mailling address

c/o MacDonald Thoroughbred Farm
Figueroa Mountain Road
Los Olivos, CA 93441

Name & Relationship

JUAN RIVAS, stranger

Age

adult

Residence/mailling address

unknown

Name & Relationship

TOLEDO TRUST COMPANY
Attn: GERALD W. MILLER

Age

adult

Residence/mailling address

3 Seagate
Toledo, OH 43603

Name & Relationship

SAINT JOHN'S HOSPITAL and HEALTH CENTER

Age

Residence/mailling address

1328 22nd
Santa Monica, CA 90404

Name & Relationship

MEMORIAL REHABILITATION FOUNDATION

Age

Residence/mailing address

300 North San Antonio Road
Santa Barbara, CA 93110
c/o Earl W. Favor, Esq.
205 E. Carrillo Street
Santa Barbara, CA 93101

Name & Relationship

CITY OF HOPE

Age

Residence/mailing address

208 West 8th Street
Los Angeles, CA 90014

Name & Relationship

ARTHRITIS FOUNDATION

Age

Residence/mailing address

2944 De La Vina Street
Santa Barbara, CA 93105
c/o Archbald & Spray
Attorneys at Law
3944 State Street
Santa Barbara, CA 93105
Attn: W. Joe Bush, Esq.

Name & Relationship

LOYOLA MARY MOUNT UNIVERSITY

Age

Residence/mailling address

Loyola Blvd. and West 80th
Los Angeles, CA 90045

Name & Relationship

HEART ASSOCIATION OF SANTA BARBARA
COUNTY

Age

Residence/mailling address

146 East Carrillo Street
Santa Barbara, CA 93101

Name & Relationship

CHILD ABUSE LISTENING MEDIATION, INC.
(CALM)

Age

Residence/mailling address

P.O. Box 718
Santa Barbara, CA 93102
c/o L. Donald Boden, Esq.
GRIFFITH & THORNBURGH
P. O. Drawer A
Santa Barbara, CA 93102

Name & Relationship

Large Animal Division of the SCHOOL OF VETERINARY MEDICINE, University of California

Age

Residence/mailling address

Davis, California

Name & Relationship

ALCOHOLICS ANONYMOUS, Central Office

Age

Residence/mailling address

1129 State Street
Santa Barbara, CA 93101

Name & Relationship

MULTIPLE SCLEROSIS SOCIETY, Channel Islands Chapter

Age

Residence/mailling address

1727 State Street
Santa Barbara, CA 93101
c/o Howard M. Simon, Esq.
SCHRAMM & RADDUE
P.O. Box 1260
Santa Barbara, CA 93102

Requests for Special Notice have been filed herein by several of the persons and organizations above listed

and notice of the time and place of hearing of this Petition will be given as required by law.

WHEREFORE, Petitioner prays that the Court determine who is entitled to the ten percent (10%) of the Trust Estate subject to Decedent's power of appointment as set forth in Article Sixth, Paragraph (I) of Decedent's Will dated March 14, 1980, and for other proper orders.

Dated: Sept. 12, 1983.

SANTA BARBARA FOUNDATION

By: /s/ L. L. WATHEY

L. L. Wathey

Treasurer

/s/ ROBERT L. BLETCHER

Robert L. Bletcher

Attorney for Petitioner

A86

Exhibit E

FILED
SUPERIOR COURT
SEP 21 1983

HOWARD C. MENZEL, County Clerk-Recorder
By C. TORRES

Deputy Clerk-Recorder

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name
and Address)

Robert L. Bletcher, Esq.
8 E. Figueroa St., Suite 210
Santa Barbara, CA 93101

TELEPHONE NO.
(805) 965-1016

ATTORNEY FOR (Name) Petitioner

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
SANTA BARBARA

Street Address: 312 Cook Street
Mailing Address: same
City and ZIP Code: Santa Maria, CA 93454
Branch Name: Santa Barbara Superior Court

ESTATE OF

MARCIA MacDONALD RIVAS aka
MARCIA MacDONALD

Decedent

CASE NUMBER
SM 38985

NOTICE OF HEARING (PROBATE)

This notice is required by law. This notice does not require you to appear in court, but you may attend the hear-

ing if your wish. If you are a person interested in the estate, you may serve upon the executor or administrator, or upon the attorney for the executor or administrator, and file with the court with proof of service, a written request stating that you desire special notice of the filing of an inventory and appraisal of estate assets or of the petitions or accounts mentioned in sections 1200 and 1200.5 of the California Probate Code.

1. NOTICE is given that (name): SANTA BARBARA
FOUNDATION

(representative capacity, if any): Petitioner

has filed (specify): PETITION FOR DETERMINA-
TION OF ENTITLEMENT TO
DISTRIBUTION OF ESTATE

reference to which is made for further particulars.

2. A hearing on the matter will be held

on (date): 10-6-83 at (time): 8:30 am in [X] Dept.:
1 [] Div.: [] Room:

located at (address of court): 312 East Cook Street
Santa Maria, CA 93454

HOWARD C. MENZEL,

Clerk

by /s/ (Illegible),

Deputy

Dated: SEP 16 1983

This notice was mailed on (date): at (place): Santa
Barbara, California.

CERTIFICATE OF ☐ POSTING ☒ MAILING

I certify that I am not a party to this cause and that a true copy of the foregoing Notice of Hearing (Probate)

1. ☐ was posted at (address):

on (date):

2. ☐ was mailed, first class, postage fully prepaid, in a sealed envelope addressed to each person whose name and address is given below and that the notice was mailed and this certificate was executed on (date): at (place): , California.

Clerk,

by _____,
Deputy

PROOF OF SERVICE BY MAIL

I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is: 8 E. Figueroa Street, Suite 210, Santa Barbara, CA 93101

I served the foregoing Notice of Hearing (Probate) by enclosing a true copy in a sealed envelope addressed to each person whose name and address is given below and depositing the envelope in the United States mail with the postage fully prepaid.

(1) Date of deposit: 9-20-83 (2) Place of deposit (city and state): Santa Barbara, CA

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on (date): 9-20-83

/s/ KAREN KIRKMAN

(Type or Print Name)

/s/ KAREN KIRKMAN

(Signature of Declarant)

NAME AND ADDRESS OF EACH PERSON TO WHOM
NOTICE WAS MAILED

See attached 3 page list.

Name & Relationship

NANCY G. JONES, mother

Age

adult

Residence/mailling address

1565 Meadow View Lane

Reno, NV 89509

46615 Eldorado Drive

Indial Wells, CA 91260

Name & Relationship

ROBERTA PAWLAK, sister

Age

adult

Residence/mailling address

24650 Park Miramar

Calabasas Park, CA 91302

c/o Arthur Weiss, Esq.

7051 Santa Monica Blvd.

Los Angeles, CA 90038

Name & Relationship

MARCIA UNI, niece

Age

adult

Residence/mailling address

2355 Plum Street

San Diego, CA 92106

Name & Relationship

JAMIE PAWLAK, nephew

Age

adult

Residence/mailing address

24650 Park Miramar
Calabasas Park, CA 91302

Name & Relationship

MARCI DE LA TORRE, stranger

Age

adult

Residence/mailing address

c/o MacDonald Thoroughbred Farm
Figueroa Mountain Road
Los Olivos, CA 93441

Name & Relationship

LISA DE LA TORRE, stranger

Age

16

Residence/mailing address

c/o MacDonald Thoroughbred Farm
Figueroa Mountain Road
Los Olivos, CA 93441

Name & Relationship

TRINIDAD DE LA TORRE, stranger

Age

13

Residence/ mailing address

c/o MacDonald Thoroughbred Farm
Figueroa Mountain Road
Los Olivos, CA 93441

Name & Relationship

JUAN RIVAS, stranger

Age

adult

Residence/ mailing address

unknown

Name & Relationship

TOLEDO TRUST COMPANY
Attn: GERALD W. MILLER

Age

adult

Residence/ mailing address

3 Seagate
Toledo, OH 43603

Name & Relationship

SAINT JOHN'S HOSPITAL and HEALTH CENTER

Age

Residence/ mailing address

1328 22nd
Santa Monica, CA 90404

Name & Relationship

MEMORIAL REHABILITATION FOUNDATION

Age

Residence/ mailing address

300 North San Antonio Road
Santa Barbara, CA 93110
c/o Earl W. Favor, Esq.
205 E. Carrillo Street
Santa Barbara, CA 93101

Name & Relationship

CITY OF HOPE

Age

Residence/ mailing address

208 West 8th Street
Los Angeles, CA 90014

Name & Relationship

ARTHRITIS FOUNDATION

Age

Residence/ mailing address

2944 De La Vina Street
Santa Barbara, CA 93105
c/o Archbald & Spray
Attorneys at Law
3944 State Street
Santa Barbara, CA 93105
Attn: W. Joe Bush, Esq.

Name & Relationship

LOYOLA MARYMOUNT UNIVERSITY

Age

Residence/ mailing address

Loyola Blvd. and West 80th
Los Angeles, CA 90045

Name & Relationship

HEART ASSOCIATION OF SANTA BARBARA
COUNTY

Age

Residence/ mailing address

146 East Carrillo Street
Santa Barbara, CA 93101

Name & Relationship

CHILD ABUSE LISTENING MEDIATION, INC.
(CALM)

Age

Residence/ mailing address

P.O. Box 718
Santa Barbara, CA 93102
c/o L. Donald Boden, Esq.
GRIFFITH & THORNBURGH
P. O. Drawer A
Santa Barbara, CA 93102

Name & Relationship

Large Animal Division of the SCHOOL OF VETER-
INARY MEDICINE, University of California

Age

Residence/mailling address

Davis, California

Name & Relationship

ALCOHOLICS ANONYMOUS Central Office

Age

Residence/mailling address

1129 State Street
Santa Barbara, CA 93101

Name & Relationship

MULTIPLE SCLEROSIS SOCIETY, Channel Islands
Chapter

Age

Residence/mailling address

1727 State Street
Santa Barbara, CA 93101
c/o Howard M. Simon, Esq.
SCHRAMM & RADDUE
P.O. Box 1260
Santa Barbara, CA 93102

Name & Relationship

CRIPPLED CHILDREN AND ADULTS EASTER
SEAL SOCIETY OF SANTA BARBARA COUNTY

Age

Residence/mailling address

31 East Canon Perdido
Santa Barbara, CA 93101

Name & Relationship

HATCH & PARENT, Attorneys at Law, creditors

Age

Residence/mailling address

21 East Carrillo St.
Santa Barbara, CA 93101
Attn: S. Timothy Buynak, Jr.

Name & Relationship

Attorney General of the State of California

Age

Residence/mailling address

555 Capitol Mall, Suite 350
Sacramento, CA 95814

Name & Relationship

Marci De La Torre

Age

Residence/mailling address

c/o S. David Schwartz
Attorney at Law
3704 State Street, #205
Santa Barbara, CA 93105

Exhibit F

ROBERT L. BLETCHER
Attorney at Law
Eight East Figueroa Street
Suite 210
Santa Barbara, California 93101
Telephone: (805) 965-1016
Attorney for Claimant

FILED
SUPERIOR COURT
OCT 13, 1983

Howard C. Menzel, County Clerk-Recorder
By C. Torres

Deputy Clerk-Recorder

SUPERIOR COURT OF THE STATE
OF CALIFORNIA
COUNTY OF SANTA BARBARA

In the Matter of the Estate of)
MARCIA MacDONALD RIVAS, aka) No. SM38985
MARCIA MacDONALD,)
Deceased.)

ORDER DETERMINING ENTITLEMENT TO
DISTRIBUTION OF ESTATE

The Petition for Determination of Entitlement to Distribution of Estate, filed herein by Santa Barbara Foundation, came on regularly for hearing on October 6, 1983. Petitioner appeared by its counsel, Robert L. Bletcher.

The Court finds as follows:

1. All notices of the hearing have been given as required law.

2. Pursuant to the terms of the Will of Marcia MacDonald Rivas, decedent, dated March 14, 1980, admitted to probate here on August 1, 1983, specifically pursuant to the provisions of Paragraph (I), Article Third thereof decedent duly exercised the power of appointment, in part, by giving 10% of the corpus of the Trust over which she had power of appointment to Alcoholics Anonymous, Central Office, 1129 State Street, Santa Barbara, California.

3. Alcoholics Anonymous, Central Office, 1129 State Street, Santa Barbara, California, an association organized and operated exclusively for charitable purposes, has declined to accept said gift and appointment, except for the sum of \$500.00.

4. Although Alcoholics Anonymous, the beneficiary of said power of appointment, has declined to accept said gift, except for the sum of \$500.00, decedent's intent should be carried into effect by appointing an organization to receive said funds and hold, administer, and distribute those assets for purposes similar to those of the designated donee.

5. Santa Barbara Foundation, is a California non-profit corporation, organized and operated solely for general, charitable, and eleemosynary purposes and is existing under the non-profit corporation laws of the State of California and is ready, able, and willing to accept the assets subject to said power of appointment and carry out the intent of decedent.

NOW THEREFORE, IT IS ORDERED:

1. 10% of the assets of that certain Trust entered into on or about January 25, 1960, between Nancy S.

Jones, as Donor, and The Toledo Trust Company, as Trustee, over which Marcia MacDonald Rivas had a testamentary special power of appointment, is hereby ordered distributed to Santa Barbara Foundation, to be held and administered as a charitable Trust as follows:

a. Purpose. The exclusive purpose for which these funds, and the income therefrom, shall be used is to support those charitable institutions, organizations and associations located in the County of Santa Barbara, State of California, to be selected from time to time in the discretion of the Trustee, which are exclusively dedicated to-rehabilitating, aiding, assisting, educating and otherwise benefiting persons suffering from the effects of alcoholism and alcohol abuse.

b. Investment and Application of Trust Fund Income. The Trustee shall hold the trust funds and, in its discretion, invest it or parts of it in securities, mutual funds and accounts in financial institutions in which charitable Trustees are permitted to invest under the laws of the State of California, or retain the funds in cash, and collect the income.

c. Distribution of Income and Principal. The Trustee shall from time to time, but not less frequently than annually, pay to such charitable organizations, institutions and associations located in Santa Barbara County, California, which are specifically organized and dedicated to the purposes of this Trust, to be selected from time to time by the Trustees, all of the net income of said Trust. In addition thereto, the Trustee may, from time to time, pay to said

organizations, institutions, and associations, dedicated to the charitable uses and purposes of this Trust, those sums from principal as the Trustee, in the Trustee's discretion, considers necessary for the support of any such organizations, institutions, and associations. Each of said organizations, institutions and associations which receive trust funds must, at the time of receipt of the contribution by the Trustee, be one of those organizations defined in the Internal Revenue Code of the United States, contributions to which are deductible for income tax purposes. All payments of income and principal shall be made only to such qualified institutions, organizations, and associations as the Trustee in the Trustee's sole discretion, may from time to time determine as shall best fulfill the purposes of this Trust.

d. Restrictions on Use of Trust Fund. The trust fund and the income thereof shall be devoted exclusively to the purposes described above and shall in no part or in no event be given or contributed to or inure to the benefit of any private person, or corporation, except to the extent of the compensation of the Trustee.

e. Reimbursement and Compensation of Trustee. The Trustee shall be reimbursed from the Trust Estate for all expenses reasonably incurred by it in the administration of the trust fund. The Trustee shall be entitled to such compensation for its services as the Trustee may from time to time determine as reasonable and such compensation shall be paid out of and charged to the trust fund.

f. Trustee Controls Funds. The Trustee shall have exclusive custody of the securities, cash, and other property of the trust fund and shall have the right to registered securities or other property held hereunder in the name of its nominee.

g. Appointment of Successor Trustee. In the case of resignation of the Trustee it shall apply to the Court for appointment of a successor Trustee, who shall thereafter have full power to act hereunder.

h. Irrevocable Trust. This Trust shall be irrevocable and may not be amended or modified, except by Court order first obtained.

i. Powers. The Trustee shall have all powers of a Trustee of a charitable trust as now or hereafter provided by law.

j. No Physical Division. The Trustee shall not be required to physically segregate the funds of this Trust but may co-mingle the assets with other charitable funds held or invested by Trustee. However, the Trustee shall keep separate accounts for this Trust.

Dated: October 13, 1983.

/s/ R. LEWELLEN

Judge of the Superior Court

Exhibit G

ARTICLES OF INCORPORATION
of
SANTA BARBARA FOUNDATION

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned: EDWARD W. ALEXANDER, ELMER J. BISSELL, REXWALD BROWN, HAROLD S. CHASE, GEORGE W. CLYDE, WILLIAM R. DICKINSON, T. WILSON DIBBLEE, ROBERT E. EASTON, CHARLES A. EDWARDS, GEORGE S. EDWARDS, REGINALD G. FERNALD, MAX C. FLEISCHMANN, E. PALMER GAVIT, BERNHARD HOFFMANN, CHARLES H. JACKSON, JR., KIRK B. JOHNSON, SETH A. KEENEY, JAMES P. KENNEDY, GEORGE W. MACLELLAN, J. J. MITCHELL, DWIGHT MURPHY, FRANCIS PRICE, CHARLES B. RAYMOND, THOMAS M. STORKE, and GEORGE W. WILSON, have all this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California, and we hereby certify:

FIRST: That the name of said corporation shall be SANTA BARBARA FOUNDATION.

SECOND: That this corporation shall be a non-profit corporation organized solely for general charitable and eleemosynary purposes under and pursuant to section 606 of the Civil Code of the State of California.

The property of this non-profit corporation is irrevocably dedicated to charitable and eleemosynary purposes, and on dissolution none of its assets shall inure to any individual but shall be distributed to a fund or foundation whose property is dedicated to exempt purposes as spec-

ified in Revenue and Taxation Code 214 of the State of California.

THIRD: That the place where its principal business is to be transacted is at Santa Barbara, in the County of Santa Barbara, State of California.

FOURTH: That this corporation shall have perpetual existence.

FIFTH: The corporation shall have a total of seventeen (17) trustees, who shall constitute the directors of the corporation. The trustees shall be selected in the manner and for the term of office specified in the bylaws of the corporation.

SIXTH: That the names of the members of the first Board of Trustees, and the terms of office of such members are as follows, to wit:

<u>NAMES</u>	<u>TERMS OF OFFICE</u>
George W. Clyde	1 year
William R. Dickinson	1 year
Charles H. Jackson, Jr.	1 year
George S. Edwards	2 years
George W. MacLellan	2 years
Francis Price	2 years
Max C. Fleischmann	3 years
Dwight Murphy	3 years
Charles B. Raymond	3 years

SEVENTH: The corporation shall have no members.

EIGHTH: The Board of Trustees is authorized in its discretion at any time and from time to time to dele-

gate either in whole or in part to one or more trust companies or banks duly authorized to conduct a trust or banking business in the State of California, or to one or more firms or organizations registered as investment advisers under the Investment Advisers Act of 1940, the matter of controlling, managing, investing, and disposing of the property of this corporation for the purpose of earning an income therefrom as distinguished from the matter of applying property or funds to charitable and eleemosynary purposes.

NINTH: The Board of Trustees, acting by a majority vote of its members, shall have the power to adopt and enforce one or more bylaws authorizing the Board of Trustees, on the terms therein specified, to modify any restriction or condition on the distribution of assets or funds of the corporation for any specified organization, and to replace any Trustees, custodian or agent serving on behalf of the corporation for breach of fiduciary duty or for failure to produce a reasonable return of net income or appreciation when not inconsistent with the corporation's need for current income), with due regard to safety of principal, over a reasonable period of time.

ENDORSED

FILED

In the office of the Secretary of State
of the State of California

OCT 14 1981

MARCH FONG-EU, Secretary of State
By JAMES E. HARRIS

Deputy

CERTIFICATE OF AMENDMENT OF
ARTICLES OF INCORPORATION
OF SANTA BARBARA FOUNDATION

Arthur L. Brown and James L. Free, Jr. hereby
certify that:

1. They are the President and Secretary, respectively, of the Santa Barbara Foundation, a California nonprofit public benefit corporation.

2. The Articles of Incorporation of said corporation shall be amended by amending Article Eighth thereof to read in its entirety as follows:

EIGHTH: The Board of Trustees is authorized in its discretion at any time and from time to time to delegate either in whole or in part to one or more trust companies or banks duly authorized to conduct a trust or banking business in the State of California, or to one or more firms or organizations registered as investment advisers under the Investment Advisers Act of 1940, the matter of controlling, managing, investing, and disposing of the property of this corporation for the purpose of earning an income therefrom as distinguished from the matter of

applying property or funds to charitable and eleemosynary purposes.

3. The foregoing amendment has been approved by the Board of Trustees of said corporation.

4. The foregoing amendment is one which may be adopted with the approval of the Board of Trustees of said corporation alone, because said corporation has no members and the approval of no other person is required under the Articles of Incorporation of said corporation.

IN WITNESS WHEREOF, the undersigned have executed this Certificate of Amendment on October 8th, 1981.

/s/ ARTHUR L. BROWN

Arthur L. Brown, President

/s/ JAMES L. FREE, JR.

James L. Free, Jr., Secretary

VERIFICATION

The undersigned, Arthur L. Brown and James L. Free, Jr., the President and the Secretary, respectively, of the Santa Barbara Foundation, each declares under penalty of perjury that the matters set forth in the foregoing Certificate of Amendment are true of his own knowledge.

Executed at Santa Barbara, California on October 8th, 1981.

/s/ ARTHUR L. BROWN

Arthur L. Brown

/s/ JAMES L. FREE, JR.

James L. Free, Jr.

CALIFORNIA PROBATE CODE § 1200.5

**§ 1200.5. Manner of giving notice in certain instances;
time; mailing; proof of giving notice; ap-
plication of section**

Text of section operative until July 1, 1987.

(a) Notice shall be given in the manner prescribed in subdivision (b) upon the filing of any of the following:

(1) A petition under Section 641 for the setting aside of an estate.

(2) A petition to set apart a homestead or exempt property.

(3) A petition relating to the family allowance filed after the return of the inventory.

(4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such.

(5) A petition for the sale of stocks or bonds.

(6) A petition for confirmation of a sale or a petition to grant an option to purchase real property.

(7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine.

(8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security.

**Underline indicates changes or additions by amend-
ment**

(9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property.

(10) A petition for an order authorizing or directing the investment of money.

(11) An account of an executor or administrator or trustee.

(12) A petition for partial or ratable or preliminary or final distribution.

(13) A petition for the delivery of the estate of a nonresident.

(14) A petition for determination of heirship or interests in an estate.

(15) A petition of a trustee for instructions.

(16) A petition for the appointment of a trustee.

(17) Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued.

(18) A report of status of administration.

(19) A petition for family allowance.

(20) An objection to the appraisement made by the executor, administrator, or probate referee.

(21) A petition under Section 709 for leave to file a claim against the estate after the expiration of the prescribed period.

(22) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.

(b) At least 10 days before the time set for the hearing of the petition or account, the petitioner or person filing the account shall cause notice of the time and place of hearing to be mailed to the executor or administrator, when he or she is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

(c) Proof of the giving of notice shall be made at the hearing; and, if it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order, and the order shall be conclusive upon all persons when it becomes final.

(d) This section does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4 applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

(e) The notice required by this section shall be in addition to the notice, if any, required to be given in the manner specified in Section 1200.

(Amended by Stats.1982, c. 520, p. 2446, § 11; Stats.1984, c. 451, p. 20.3; Stats.1984, c. 1017, p., § 6.)

For text of section operative July 1, 1987, see § 1200.5, post.

§ 1200.5. Manner of giving notice in certain instances; time; mailing; proof of giving notice; application of section

Text of section operative July 1, 1987.

(a) Notice shall be given in the manner prescribed in subdivision (b) upon the filing of any of the following:

(1) A petition under Section 641 for the setting aside of an estate.

(2) A petition to set apart a homestead or exempt property.

(3) A petition relating to the family allowance filed after the return of the inventory.

Asterisks * indicate deletions by amendment**

3

Supreme Court, U.S.
FILED
FEB 5 1988
JOSEPH F. SPANIO, JR.
CLERK

No. 87-1132

IN THE

Supreme Court of the United States

October Term, 1987

**THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST
NO. 4118 AND THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,**

Petitioners,

vs.

SANTA BARBARA FOUNDATION,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. McHUGH, III

Counsel of Record

WILLIAM F. BATES

GARY O. SOMMER

1200 National Bank Building

Toledo, Ohio 43604-1157

(419) 241-2100

Attorneys for Respondent

Santa Barbara Foundation

H3PP

I.

PETITIONERS' QUESTION RESTATED

Whether a California *cy pres* construction to fulfill the general charitable intent of its domiciliary's last will and testament is entitled to full faith and credit by a sister state in determining the effective exercise of a special testamentary power of appointment conferred by a non-domiciliary trust.

II.

TABLE OF CONTENTS

	Page
Petitioners' Question Restated	I
Table of Authorities	IV
Statement of Facts	2
Summary of Argument	2
Reasons for Denying the Writ	3
I. Petitioner Trustee of Trust No. 4117 Has Failed to Raise or Preserve Any Federal Constitutional Issue	3
II. Petitioner Trustee of Trust No. 4118 Has Failed to Raise or Preserve the Constitutional Issue for Which It Seeks Review	4
III. A Grant of a Special Testamentary Power of Appointment Is Consent to the Exercise by the Domiciliary Court of Personal Jurisdiction Over the Grantor and Those Claiming Derivatively Under Him in Matters Involving Construction of the Last Will and Testament	8
IV. The Forecasted "Disruptive Effect on Trust Litigation" Argument Was Effectively Raised and Rejected Seventeen Years Ago	12
Conclusion	13

III.

Appendix:

Complaint filed in the Lucas County, Ohio Court
of Common Pleas on November 3, 1983
(Excerpt)..... A1

Memorandum of Appellee The Toledo Trust
Company, as Trustee of Trust No. 4117, on
Motion to Certify, filed in the Ohio Supreme
Court (Excerpt) A5

Motion to Dismiss and Memorandum Opposing
Jurisdiction of Defendants-Appellees The
Toledo Trust Company, as Trustee of Trust No.
4118 and Nancy S. Jones, filed in the Ohio
Supreme Court (Excerpt) A7

Brief of Appellee The Toledo Trust Company, as
Trustee of Trust No. 4117, filed in the Ohio
Supreme Court (Excerpt) A11

Brief of Appellees The Toledo Trust Company, as
Trustee of Trust No. 4118 and Nancy S. Jones,
filed in the Ohio Supreme Court (Excerpt) A13

Motion for Rehearing, filed in the Ohio Supreme
Court..... A16

Memorandum of Appellees The Toledo Trust
Company as Trustee of Trust No. 4118 and
Nancy S. Jones in Support of Motion for
Rehearing, filed in the Ohio Supreme Court.... A19

IV.

TABLE OF AUTHORITIES

Cases

<i>Asahi Metal Industry Co. v. Superior Court of California, Solano County</i> , 480 U.S. _____, 107 S. Ct. 1026 (1987)	9
<i>Beck v. Ohio</i> , 379 U.S. 89 (1964)	7
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	9,12
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969)	4,8
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958)	5,6,7,11,13
<i>Hill v. California</i> , 401 U.S. 797 (1971)	4,8
<i>In re Morgan Guaranty Trust Co. (In re Acheson)</i> , 28 N.Y.2d 155, 320 N.Y. Supp. 2d 905, 269 N.E.2d 571 (1971)	5,6,9,12,13
<i>In re Trustees under Will of Yost</i> , 102 Ohio App. 62 (1956)	3
<i>Kirbens v. Wodis</i> , 295 F.2d 372 (7th Cir. 1961)	11
<i>Osborne v. Clark</i> , 204 U.S. 565 (1907)	7
<i>Perkins v. Benquet Consol. Mining Co.</i> , 342 U.S. 437 (1952)	7
<i>Street v. New York</i> , 394 U.S. 576 (1969)	7
<i>The Toledo Trust Co. v. Farmer</i> , 165 Ohio St. 378 (1956)	3,9
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	10

Rules

Ohio Supreme Court Rules for the Reporting of Opinions 1(B)	7
---	---

No. 87-1132

IN THE

Supreme Court of the United States

October Term, 1987

**THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118 AND THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF
TRUST NO. 4117,
*Petitioners,***

vs.

**SANTA BARBARA FOUNDATION,
*Respondent.***

**ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF FACTS

Petitioners' statement of the case, including the chronology of events giving rise to the claim, is fair and accurate, and requires no amplification from respondent.

SUMMARY OF ARGUMENT

The substantial federal question which petitioners jointly present was not properly raised before or decided by the Ohio Supreme Court, as a result of which exercise of jurisdiction under 28 U.S.C. §1257 is inappropriate. As Trustee of Trust No. 4117, the stakeholder trust, petitioner declined to submit any arguments or assert any position at the state trial, appellate, or supreme court level. Having elected not to participate below, it cannot seek ultimate review from this Court.

The Trustee of Trust No. 4118, the rival claimant to the appointed assets, similarly failed to raise or preserve the "minimum contacts" personal jurisdiction challenge. Its papers filed below did not disclose with reasonable precision its Fourteenth Amendment claim. To the contrary, its brief is silent on that issue.

The constitutional arguments presented here were not raised by petitioners or decided by the Ohio Supreme Court. Introduction of these claims at this juncture is insufficient to warrant review.

REASONS FOR DENYING THE WRIT

I. Petitioner Trustee of Trust No. 4117 Has Failed to Raise or Preserve Any Federal Constitutional Issue.

Petitioner Trustee of Trust No. 4117 is the trustee of the irrevocable trust, the disposition of whose assets have engendered the controversy below. In all proceedings at the state level, it had assumed the position of neutral stakeholder, retaining the appointed share of the assets pending judicial determination of entitlement. Apart from initiating the trust construction action in the trial court, the stakeholder trustee has not participated in any proceedings. [Appendix at A1-A6, A11-A12.] It did not brief or argue the issue in the trial court, the state appellate court, or the state supreme court. [Appendix at A12.] It now has no standing to petition for the writ, since by its own deliberate omissions, it failed to raise and preserve the due process Fourteenth Amendment issue it seeks to assert.

Under Ohio law, a trustee acting as a stakeholder with no duty to perform other than to pay out funds to various claimants as ordered by a proper court has no right to appeal from that order, even though he thinks that the court erred in making it. *The Toledo Trust Co. v. Farmer*, 165 Ohio St. 378 (1956); *In re Trustees under Will of Yost*, 102 Ohio App. 62 (1956). The Ohio Supreme Court in its decision declared that the appointed assets should be distributed to respondent Foundation; upon remand, the trial court ordered it. Further participation by the trustee is unauthorized under Ohio law, by reason of which it lacks standing to proceed.

Even more, it is evident that petitioner stakeholder trustee has failed to raise, present, or preserve a federal constitutional issue. It consciously elected not to appear

in the California proceedings. Apart from filing the construction action, it intentionally chose not to participate in the Ohio action from the trial court throughout the entire appellate review process. Its conduct was not a series of inadvertent omissions, but calculated tactics employed by a multi-state commercial trustee upon the advice of well-regarded counsel. Having chosen a strategy of non-participation, disappointment with the result affords neither state nor federal right of review.

No due process Fourteenth Amendment claim premised on a want of personal jurisdiction was even presented by this petitioner to the lower courts. Having declined to formulate and assert any constitutional issue before the state trial, appellate, or supreme courts, it can hardly demand consideration of its claim before this Court. *Hill v. California*, 401 U.S. 797 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

II. Petitioner Trustee of Trust No. 4118 Has Failed to Raise or Preserve the Constitutional Issue for Which It Seeks Review.

Petitioner Trustee of Trust No. 4118 is the designated taker in default should it be determined that the lifetime beneficiary of Trust No. 4117 failed to exercise the special testamentary power of appointment. Its interests conflict with those of respondent Santa Barbara Foundation, since they alone are the competing claimants for entitlement to the remaining undistributed share of the appointed assets.

Its petition exhibits the same deficiency as that of Trust No. 4117, for it failed to raise, present, or preserve the specific "minimum contacts" personal jurisdiction issue which it now introduces. In opposing discretionary

review by the Ohio Supreme Court, as well as in its briefs on the merits once jurisdiction was exercised, the rival claimant did not ever assert that *it* had no "minimum contacts" with California, that *it* had never "purposefully avail[ed] itself of the privilege of conducting activities within the forum state," or that the exercise of jurisdiction would offend the due process guarantee of the Fourteenth Amendment. [Appendix at A7-A10, A13-A15.]

References to that constitutional provision, as well as citation to the recent personal jurisdiction opinions of this Court, writ so large in the joint petition, are absent from the papers filed in the Ohio Supreme Court. Citation to *Hanson v. Denckla*, 357 U.S. 235 (1958), is made, to be sure. It is noted, however, for the proposition that the California court lacked jurisdiction over the trustee or trust assets, without which a judgment could not be entered, as much as for a want of jurisdiction over the rival claimant. [Appendix at A14-A15.]

Whatever may be petitioners' retrospective significance attached to the citation to *Hanson* in the papers below, it is plain that it was presented to the Ohio Supreme Court as authority for the substantive proposition that the California court could not enter judgment without acquiring jurisdiction over the trustee or assets. Implicit was the contention that the trustee was a necessary party to adjudication of that claim. For that reason, the Ohio Supreme Court distinguished the substantive law principle announced in *Hanson*, and found guidance in the companion analysis employed by the New York Court of Appeals in *In re Morgan Guaranty Trust Co. (In re Acheson)*, 28 N.Y.2d 155, 320 N.Y. Supp. 2d 905, 269 N.E.2d 571 (1971).

In *Acheson*, as in the court below, the rival claimants insisted that a California court lacked jurisdiction to reform a testamentary instrument the consequence of which construction was to save a power of appointment. Reliance was premised upon *Hanson v. Denckla*. In *Acheson*, as in the court below, the determination was made that a probate court could construe the will consistent with the testator's intention, without requiring jurisdiction over the trustee or trust assets. That construction of the will would then be entitled to full faith and credit in the state charged with administering the trust. No different analysis was applied below than in *Acheson*. The tribunal charged with interpreting the will was entitled to do so; its determination was then entitled to full faith and credit by a sister state in distributing the trust.

Petitioners complain that the Ohio Supreme Court did not find such "affiliating circumstances" with California so as to warrant the exercise of personal jurisdiction. [Petition at 11.] The argument neglects to disclose where, in the jurisdictional papers or in the briefs on the merits, the Ohio Supreme Court was specifically requested to resolve that issue. [Appendix at A5-A15.]

Notwithstanding Trust No. 4118's assertion that the federal claims were timely and persistently raised and decided, the contrary is in fact true. Its papers failed to even cite the Fourteenth Amendment, let alone the trilogy of personal jurisdiction opinions issued by this Court in the 1980s before its brief was filed below.

Trust No. 4118 never presented any due process minimum contacts argument to the Ohio Supreme Court. Even if it were argued that such a significant constitutional contention was present by implication, it

is evident that the state supreme court did not consider it and resolve it. The opinion below, like the papers of petitioners, was silent on such fundamental concepts as minimum contacts and purposeful activity in the forum state.

By Ohio Supreme Court rule,¹ the only matters actually decided are carried forward into its syllabus. It alone reflects the law of the case. *Beck v. Ohio*, 379 U.S. 89 (1964); *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952). Reference to the three propositions of law articulated by the state court confirm that it never considered, let alone decided, the Fourteenth Amendment due process personal jurisdiction claim.

It is insufficient simply to posit the opinion to the state court, and then contend that all matters addressed in the opinion must necessarily have been considered and resolved by the state court. *Osborne v. Clark*, 204 U.S. 565 (1907). That is all the more apparent here given the breadth of the state substantive and federal procedural issues set forth in *Hanson v. Denckla*.

This Court has repeatedly held that where, as here, "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts." *Street v. New York*, 394 U.S. 576 (1969). Considerations of the federal judicial system, the need to insure that a sound and accurate record is presented, let alone the

¹ Rule 1(B) of the Supreme Court Rules for the Reporting of Opinions, effective March 1, 1983 recites:

"The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication."

jurisdictional requisite that the state's highest court actually decide the federal constitutional issue, require that the petitioner affirmatively demonstrate that the claim was presented and actually decided by the court whose judgment is subject to review. *Hill v. California*, 401 U.S. 797 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). He fails to do so at his peril.

III. A Grant of a Special Testamentary Power of Appointment Is Consent to the Exercise by the Domiciliary Court of Personal Jurisdiction Over the Grantor and Those Claiming Derivatively Under Him in Matters Involving Construction of the Last Will and Testament.

Pointing to alleged *in personam* jurisdictional deficiencies, petitioners insist that enforcement of the California judgment denied them due process of law. The proposition is grounded upon the claim that neither the trustee nor the rival claimant had sufficient "minimum contacts" with California to justify the exercise of personal jurisdiction. Petitioners affirmatively contend² that the "Ohio Supreme Court did not find, nor [sic] does the record disclose, any such 'affiliating circumstances.'" [Petition at 11.]

To the extent that the claimed jurisdictional omission is directed at the stakeholder trustee, it is insignificant since the stakeholder had no separate interest in disposition of the assets. It had no distinct right adjudicated in California, since the validity or integrity of the trust was never drawn in issue. Arguments to the contrary are makeweight, since the

² As noted above, that issue was never squarely raised with or resolved by the state supreme court. Ultimate judicial review should not be premised on the absence of a decision never in fact addressed to the court.

stakeholder trustee never participated in any of the Ohio proceedings. It would hardly maintain spectator status were its own existence at issue, yet that is the posture it continued to assume until the adverse Ohio Supreme Court decision. Petitioners point to no law, either Ohio or California, which declares the trustee to be an indispensable party to the will construction action. Properly observed, its role was confined to distribution of the assets consistent with the construction made by the California court. *The Toledo Trust Co. v. Farmer*, 165 Ohio St. 378 (1956); *In re Morgan Guaranty Trust Co. (In re Acheson)*, 28 N.Y.2d 155, 320 N.Y. Supp. 2d 905, 269 N.E.2d 571 (1971).

Trust No. 4118 as the rival claimant was an interested and affected party since failure of a valid and effective exercise by the lifetime beneficiary would result in a transfer over to this taker in default. The rival claimant echoes the personal jurisdiction objection, again without acknowledging that it failed to present that specific jurisdictional objection in language directed to, or with citation to authority for the absence of, its minimum contacts or purposeful activity in California. Since the inquiry was not raised in the state supreme court, it is inappropriate to assign fault for its having failed to address the issue.

It would be presumptuous to suggest how the Ohio court may have responded, but it may well have found sufficient "affiliating circumstances" to permit the exercise of jurisdiction. Consistent with the analysis formulated by this Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. _____, 107 S. Ct. 1026 (1987), the Ohio Supreme Court may well have concluded that the rival

claimant, as taker in default, was bound by the consent to jurisdiction conferred by the settlor in granting the testamentary power of appointment. With a truly passive interest which in no conceivable way could be advanced by its own activity, its status and posture were truly derivative, and its position fully parallel to that of the settlor of the trust. Like an assignee, the rival claimant stood in the shoes of its settlor.

By conferring a special *testamentary* power of appointment to distribute the corpus of the trust, the settlor must have recognized that the testament would be evaluated by a domiciliary court somewhere, for a will not admitted to probate could hardly serve as a testamentary appointment. Even more, a will construed by the domiciliary court might impact the determination whether an effective exercise has been made. While mere foreseeability alone that a claim might surface in a different state has "never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), an express consent to the exercise of jurisdiction wherever it may be invoked stands on a different footing. Here, with mobility an essential feature of American life, the settlor knew that another state would ultimately be involved. Why would the trust otherwise contain a choice of law provision? It was inevitable that another state would be called upon to assess the last will and testament. That consequence was invited by the grant of a testamentary power, and could have been avoided by requiring an *inter vivos* appointment lodged in Ohio.

By granting the special power to her daughter to be exercised by will, the settlor conferred upon the income beneficiary the right to select the initial forum for resolution. A warrant of attorney to confess judgment

wherever the holder of a cognovit note may be found is not constitutionally suspect. *Kirbens v. Wodis*, 295 F.2d 372 (7th Cir. 1961). Where a potential defendant, or one claiming derivatively under him, consents in advance to the determination of any forum chosen by the plaintiff, traditional notions of fair play and substantial justice are not offended when the jurisdictional power of a sister state is exercised over a non-resident.

The only forum competent and authorized to probate or construe a testatrix's last will and testament is the state of domicile. In conferring the testamentary power of appointment, the settlor agreed in advance to contest issues related to the will and its construction in the domiciliary forum. That consent necessarily binds the taker in default whose singular interest is entirely derivative of the settlor, and is not avoided merely because the exercise of jurisdiction by the other court produces an unsatisfactory result.

Had the settlor chosen to confine any litigation to Ohio, a forum selection provision might have been recited in the trust instrument. Had the settlor intended that the exercise of a power of appointment be determined solely by an Ohio court, free from construction by a sister state, the trust might have required an *inter vivos* appointment. *Hanson v. Denckla* specifically advised that *inter vivos* dispositions were free from a jurisdictional assault; testamentary dispositions were not necessarily so.

Given the grant of a testamentary power of appointment, wherever it might be exercised, and cognizant of the essentially local nature of a probate proceeding, the settlor must have appreciated that it was

likely that she could be haled into any jurisdiction as a result of the probate of her daughter's will. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). No less an apprehension should have been apparent to the taker in default.

IV. The Forecasted "Disruptive Effect on Trust Litigation" Argument Was Effectively Raised and Rejected Seventeen Years Ago.

Predicting a surge of litigation that will overwhelm both the judiciary and large multi-state commercial trustees, petitioners insist that this Court must intervene to insure that another "regime of 'policing' by the federal courts" over trust administration litigation will not result. At this juncture, the concern is both belated and hollow.

It is curious that such a significant fear should arise only *after* an unfavorable determination. Petitioner trustees were silent on this prospect in all the courts below. Given the result argued for by respondent, it seems that such concerns should have been voiced as strenuously below.

The Ohio Supreme Court firmly stated that matters of will construction are to be determined by the domiciliary forum. Determination of the effective exercise of a testamentary power of appointment is to be made by the state charged with its administration, but with deference to the construction of the will given by the probate state. *In re Morgan Guaranty Trust Co. (In re Acheson)*, 28 N.Y.2d 155, 320 N.Y. Supp. 2d 905, 269 N.E.2d 571 (1971). Below, the supreme court ruled that since the only practical dispute was whether the substituted appointee would take the assets, and even under petitioners' argument an effective exercise would then take place, the substitution of the Foundation for

Alcoholics Anonymous was decisive. Probate determinations do not substitute for trust administration decisions, but they do command full faith and credit.

The prophecy of doom repeated here may differ little from that raised by the disappointed claimants in *In re Morgan Guaranty Trust Co.*, *supra*. They too insisted that *Hanson v. Denckla* had been violated, and might have foretold the same consequences which petitioners here echo. Examination of the opinions over the last seventeen years since certiorari was denied failed to disclose a floodgates consequence. Capable drafting of choice of law and forum selection provisions, as well as careful observance of conflicts of law principles, have enabled most settlors, trustees, and beneficiaries to address those issues. There is no reason to suggest that the difficulty is insurmountable now.

CONCLUSION

For the foregoing reasons, and particularly for the failure of the petitioners to preserve and secure a determination by the Ohio Supreme Court on the constitutional issue which they now raise, the writ should be denied.

Respectfully submitted,

JOHN J. MCHUGH, III*

WILLIAM F. BATES

GARY O. SOMMER

1200 National Bank Building

Toledo, Ohio 43604-1157

Telephone: (419) 241-2100

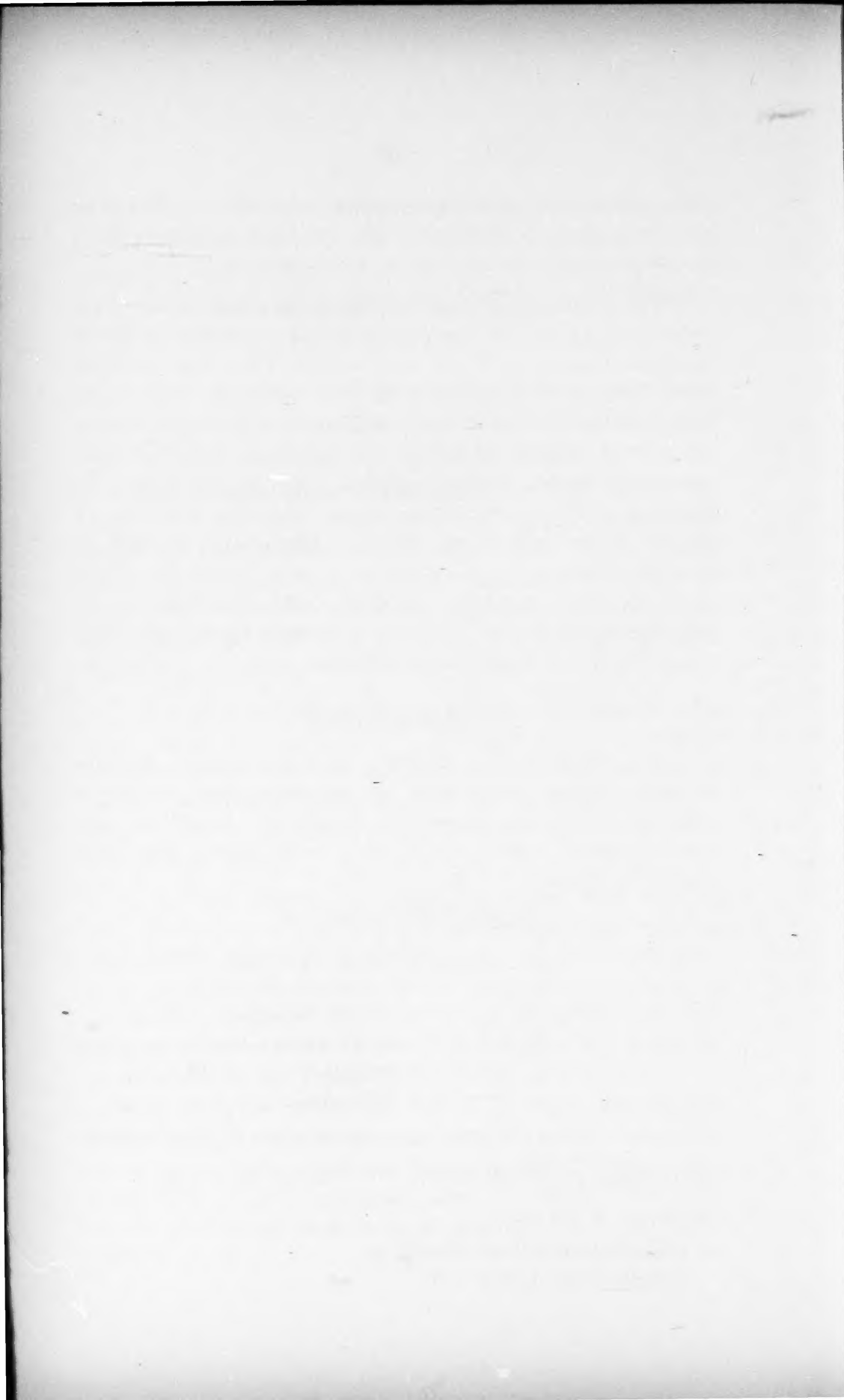
Attorneys for Respondent

*Of Counsel for Respondent: * Counsel of Record*

WATKINS & BATES

1200 National Bank Building

Toledo, Ohio 43604-1157



A1

APPENDIX

COMPLAINT FILED IN THE COURT OF COMMON
PLEAS OF LUCAS COUNTY,
OHIO (EXCERPT)

(Filed November 3, 1983)

No. 83-2699

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117,

Three SeaGate,
Toledo, Ohio 43603,
Plaintiff,

v.

SANTA BARBARA FOUNDATION,
Santa Barbara, California,

ALCOHOLICS ANONYMOUS,
Central Office,
1216 State Street,
Santa Barbara, California 93101,

HON. ANTHONY J. CELEBREEZE, JR.,
Attorney General, State of Ohio,
30 E. Broad Street,
Columbus, Ohio 43215,

THE TOLEDO TRUST COMPANY, as
Trustee of Trust No. 4118,
Three SeaGate,
Toledo, Ohio 43603; and

NANCY S. JONES,
1565 Meadow View Lane,
Reno, Nevada 89509,
Defendants.

COMPLAINT

Donald F. Melhorn, Jr. (5895)
Marshall & Melhorn
1400 National Bank Building
Toledo, Ohio 43604
(419) 243-4200
Attorney for Plaintiff

1. Plaintiff The Toledo Trust Company, an Ohio banking corporation authorized to exercise trust powers, is Trustee of a trust carried on its records as Trust No. 4117, established by written Trust Agreement dated January 28, 1960 between defendant Nancy S. Jones as Donor and plaintiff as such Trustee, a copy of which Trust Agreement is here attached as Exhibit A. The situs of said Trust and the locus of its administration are at plaintiff's office in Toledo, Lucas County, Ohio.

2. Defendant Santa Barbara Foundation is a corporation formed for charitable purposes, organized and existing under the laws of the State of California, and having its principal place of business in the County of Santa Barbara, California.

* * * * *

9. After the death of Marcia MacDonald Rivas, defendant Alcoholics Anonymous, Central Office, declined to accept distribution of any of the assets of Trust No. 4117 appointed to said defendant under the aforesaid terms of the Will of Marcia MacDonald Rivas, except for the sum of Five Hundred Dollars (\$500.00),

which sum said defendant was and is willing to accept. At the time of so declining, said defendant was specifically aware of the terms of the Trust Agreement, the terms of the Trust Agreement, the terms of the Will, and of the fact that the value of the property which would have been distributed to said defendant had said defendant not so declined, was substantially in excess of Five Hundred Dollars (\$500.00). Said defendant has not thereafter changed its position, and continues to decline to accept any distribution in excess of Five Hundred Dollars (\$500.00).

10. On September 16, 1983 defendant Santa Barbara Foundation filed in the Superior Court of the State of California, County of Santa Barbara, a "Petition for Determination of Entitlement to Distribution of Estate." In said Petition, docketed under No. 5M 38985 of the records of said Superior Court, defendant Santa Barbara Foundation alleged that defendant Alcoholics Anonymous, Central Office, had declined as aforesaid, and prayed that said Superior Court determine who is entitled to assets of Trust No. 4117 which, but for said declination, would have passed to said defendant Alcoholics Anonymous, Central Office, pursuant to the aforesaid terms of paragraph (I), Article SIXTH of the Will of Marcia MacDonald Rivas. Plaintiff made no appearance in the aforesaid Superior Court in response to said "Petition," or in any proceedings held in respect thereto.

11. On October 13, 1983 the aforesaid Superior Court made and entered an "Order Determining Entitlement to Distribution of Estate," which purported to determine and direct that such assets of Trust No. 4117 as would have been distributed to defendant Alcoholics Anonymous, Central Office, but for its declining as aforesaid, should now be distributed to

defendant Santa Barbara Foundation, to be held and administered upon a further trust described in the terms of said Order, for the benefit of charitable institutions, organizations and associations located in the County of Santa Barbara, State of California which are exclusively dedicated to rehabilitating, aiding, assisting, educating and otherwise benefiting persons suffering from the effects of alcoholism and alcohol abuse. Copies of said Order and notice of entry thereof are here attached as Exhibit C.

12. Plaintiff The Toledo Trust Company, as Trustee of Trust No. 4117, is in doubt concerning its obligations in respect to the aforesaid Order of the Superior Court of the State of California, Santa Barbara County, and otherwise as to its duties and responsibilities with respect to distribution of the trust assets in question.

WHEREFORE, as Trustee of Trust No. 4117, plaintiff The Toledo Trust Company prays the direction of this Court of Common Pleas of Lucas County, Ohio, respecting the Trust or property to be administered and the rights of the parties in interest; and in particular, that this Court determine the validity and effect of the aforesaid Order of the Superior Court of the State of California, Santa Barbara County, and by such determination or otherwise, advise and instruct plaintiff concerning the proper disposition and application of the trust assets in question. Plaintiff also prays judgment for its costs, and for allowance of its reasonable expenses, including attorney fees, in this proceeding.

/s/ DONALD F. MELHORN, JR.

Attorney for Plaintiff

The Toledo Trust Company,

Trustee of Trust No. 4117

MARSHALL & MELHORN

1400 National Bank Bldg.

Toledo, Ohio 43604

(419) 243-4200

A5

**MEMORANDUM OF APPELLEE THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST NO. 4117,
ON MOTION TO CERTIFY FILED IN THE
SUPREME COURT OF OHIO (EXCERPT)**

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

**MEMORANDUM OF APPELLEE THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST NO. 4117,
ON MOTION TO CERTIFY**

* * * * *

A6

ARGUMENT

The jurisdictional issues presented in this appeal are appropriately addressed by the claimants to the property in question.

Plaintiff-Appellee, The Toledo Trust Company, as Trustee of Trust No. 4117, elects to make no submission concerning such issues.

Respectfully submitted,

/s/ DONALD F. MELHORN, JR.

*Attorney for The Toledo Trust
Company, as Trustee of No. 4117*

MARSHALL & MELHORN

Four SeaGate, Eighth Floor
Toledo, Ohio 43604
(419) 249-7100

**MOTION TO DISMISS AND MEMORANDUM
OPPOSING JURISDICTION OF DEFENDANTS-
APPELLEES THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118 AND NANCY S.
JONES FILED IN THE SUPREME COURT OF
OHIO (EXCERPT)**

No. 86-1064

IN THE SUPREME COURT OF OHIO

**THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117,
*Appellee,***

vs.

**SANTA BARBARA FOUNDATION,
*Appellant,***

and

**THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
*Appellees.***

**Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio Sixth
Appellate District**

MOTION TO DISMISS AND MEMORANDUM
OPPOSING JURISDICTION OF DEFENDANTS-
APPELLEES THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118 AND NANCY S.
JONES

* * * * *

Proposition of Law No. 2

A final judgment of a foreign court lacking jurisdiction of the subject-matter and of the parties need not be accorded full faith and credit.

The discussion under Appellant's Proposition of Law No. 2,

"Equity will aid the exercise of a power of appointment"

does not reach the ultimate issue, whether equity *should in this case* aid the exercise of Rivas' special power of appointment. Rather, that Proposition of Law is essentially academic, Appellant's claim to the trust assets not having been denied because of any holding of the lower courts contrary to that Proposition.

One is neither shocked nor surprised that the California Court, in an uncontested proceeding, determined that the property should pass to a local charity. Quite aside from any substantive order of the court,¹ however, an examination of the jurisdictional elements of Appellant's resort to equity in the California

¹ Neither court below reached the issue of the applicability of the cypres doctrine, the trial court having found the failure of effective exercise by Rivas dispositive as a threshold matter (see p. 4, OPINION AND JUDGMENT ENTRY, at Appendix, p. 30, Appellant's Memorandum) and the court of appeals holding that even if this were a proper case to recognize and apply the doctrine, the taker in default would prevail (see p. 6, DECISION AND JOURNAL ENTRY, at Appendix p. 24, Appellant's Memorandum).

Court reveals fundamental infirmities which prohibit an Ohio court from granting full faith and credit to any order issued there.

No one challenges the California Court's jurisdiction over the decedent's estate or *her* property. But,

"Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power." *Cleveland Trust Co. v. McQuade* (1957), 106 Ohio App. 237, 250.

The Rivas Trust was an Ohio trust, with Ohio assets, an Ohio trustee, and an Ohio taker in default. Appellant makes no claim that the California Court had in rem jurisdiction over the trust assets or personal jurisdiction over the trustee or the taker in default.

Appellee Pawlak Trust, as taker in default of the effective exercise of the special power of appointment, has a vested remainder interest in the appointive property. *Central Trust Co. v. Watt* (1941), 139 Ohio St. 50. Appellant's protestations to the contrary notwithstanding, the California Court cannot destroy vested property rights of persons not parties to that action.

Even if the final judgment of the California Superior Court is construed to purport to establish the effectiveness of the exercise of the special power of appointment, it need not be accorded full faith and credit under Article IV, Section 1 of the United States Constitution. In an unbroken line of decisions, including *D'Arcy v. Ketchum*, 11 Howard 165, 52 U.S. 165, 13 L.Ed. 648 (1850); *Pennoyer v. Neff*, 95 U.S. 679, 24 L.Ed. 565 (1877); and *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283 (1958), the United States Supreme Court has held that a judgment rendered without proper

jurisdiction, either over person or property, is void and is not entitled to full faith and credit in a sister state. This precise conclusion was reached by the Ohio Court of Appeals in *Toledo Trust Co. v. National Bank of Detroit* (1976), 50 Ohio App. 2d 147, m.c.o. September 10, 1976. Such a well-settled principle of constitutional law clearly denies the existence of a substantial constitutional question deserving consideration by this Court, and does not otherwise create a case of public or great general interest.

CONCLUSION

Appellant's motion to certify should be overruled. These Appellees' motion to dismiss the appeal as one not involving any substantial constitutional question should be granted.

Respectfully submitted,

ROBISON, CURPHEY & O'CONNELL
/s/ MICHAEL S. MESSENGER
Ninth Floor, Four SeaGate
Toledo, Ohio 43604
Attorneys for Defendants-
Appellees The Toledo
Trust Company, Trustee of
Trust No. 4118 and
Nancy S. Jones

**BRIEF OF APPELLEE THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST
NO. 4117 FILED IN THE SUPREME
COURT OF OHIO (EXCERPT)**

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

**BRIEF OF APPELLEE THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST
NO. 4117**

* * * * *

ARGUMENT

The merits of this appeal are appropriately addressed by the claimants to the property in question.

Appellee, The Toledo Trust Company, as Trustee of Trust No. 4117, elects to make no submission concerning such issues.

Respectfully submitted,

/s/ DONALD F. MELHORN, JR.

*Attorney for The Toledo Trust
Company, as Trustee of No. 4117*

MARSHALL & MELHORN
Four SeaGate, Eighth Floor
Toledo, Ohio 43604
(419) 249-7100

**BRIEF OF APPELLEES THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST NO. 4118
AND NANCY S. JONES (EXCERPT)**

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

**BRIEF OF APPELLEES THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST NO. 4118
AND NANCY S. JONES**

* * * * *

Proposition of Law No. 3

A Final Judgment of A Foreign Court Lacking
Jurisdiction Of the Subject-Matter And of the
Parties Need Not Be Accorded Full Faith and Credit

With respect to the ex parte proceeding in the Superior Court of the State of California, County of Santa Barbara, Appellant recites at page 4 of its BRIEF that "Notice of the hearing was served by mail upon appellees The Toledo Trust Company and Nancy S. Jones", but Appellant fails to disclose that the entry of that Court purporting to order distribution of the corpus of the Rivas Trust to Appellant issued without the Court having obtained, or attempting to obtain, jurisdiction over the trustee of the Rivas Trust, the trustee of the taker-in-default of the effective exercise and the special power of appointment, the Pawlak Trust, or the trust assets.

Appellant demands in one paragraph on pages 23 and 24 of its BRIEF that full faith and credit be given the entry of the California Superior Court ordering distribution of the renounced appointive assets to it. That demand is squarely at odds with Federal constitutional law and must be rejected.

The Pawlak Trust owns a vested remainder interest in the appointive assets subject to the divestment upon Rivas' effective exercise of her special power of appointment. *Central Trust Co. v. Watt*, above, at 64. Absent jurisdiction over the necessary parties, the California court could not destroy their property rights.

In *Toledo Trust Co. v. National Bank of Detroit* (1976), 50 Ohio App. 2d 147, m.c.o. September 10, 1976, the Lucas County Court of Appeals affirmed the trial court in holding that a Michigan decree authorizing the exercise of a power of appointment by a Michigan guardian on behalf of its Michigan ward over property held in trust in Ohio was not entitled to full faith and credit in Ohio where the Michigan Probate Court lacked jurisdiction over the appointive assets, the trustee, and the takers in default of appointment, the identical

defects in the jurisdiction of the California court. Neither the California decree concerning the construction of the Rivas will nor the Michigan decree concerning the guardianship affected the ownership of the trust assets: a lack of jurisdiction over the appointive assets, the trustee, and the taker in default precludes a valid judgment concerning the disposition of the appointive assets. See *Hanson v. Denckla* (1958), 357 U.S. 235, 2 L. Ed. 2d 1283.

The Court of Appeals implicitly ignored the California decree in determining whether cy pres was applicable in aid of the ineffective appointment. Appellant does not criticize the Court of Appeals' approach in applying its own judgment on the cy pres issue. Ohio courts may not afford full faith and credit to this California decree.

CONCLUSION

Both the trial court and the unanimous Court of Appeals have properly reviewed and analyzed the applicable law in determining that Rivas having failed effectively to exercise her testamentary special power of appointment, the vested remainder interest of the Pawlak trust was not divested and the appointive assets should pass to it. The judgment of the Appellate Court should be affirmed.

Respectfully submitted,

MICHAEL S. MESSENGER
ROBISON, CURPHEY & O'CONNELL
Ninth Floor, Four SeaGate
Toledo, Ohio 43604
(419) 249-7900

*Attorneys for The Toledo Trust
Company, as Trustee of Trust
No. 4118, and Nancy S. Jones*

**MOTION FOR REHEARING FILED IN THE
SUPREME COURT OF OHIO**

Case No. 86-1064

IN THE SUPREME COURT OF OHIO

**THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
*Appellee,***

vs.

**SANTA BARBARA FOUNDATION,
*Appellant,***

and

**THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
*Appellees.***

**Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District**

MOTION FOR REHEARING

Plaintiff/Appellee The Toledo Trust Company, Trustee of Trust No. 4117, respectfully moves, under Rule IX, Supreme Court Rules of Practice, for rehearing and clarification of the Court's August 26, 1987 Opinion, Mandate and Journal Entry.

As Trustee of Trust No. 4117 The Toledo Trust Company brought this action as plaintiff, seeking a determination as to which of two claimant parties,

named as defendants, certain assets of Trust No. 4117 are properly distributable. The claimant parties are Santa Barbara Foundation and The Toledo Trust Company as Trustee of Trust No. 4118.¹

Trust No. 4117 is governed by a trust agreement, quoted in this Court's August 26, 1987 Opinion, which provides that the property in question shall be distributed either pursuant to the exercise of a special power of appointment, or, if the donee of the power "fails effectively to exercise" it, then to a designated taker-in-default of such exercise. The claim of Santa Barbara Foundation is that the power was effectively exercised in its favor. The claim of The Toledo Trust Company as Trustee of Trust No. 4118 is that the power was not effectively exercised, and that it is entitled to the property in question as taker-in-default.

In the judgment affirmed by the Court of Appeals and here appealed from, the Court of Common Pleas determined that "the exercise of the special power of appointment was ineffective," and ordered distribution accordingly. The Court of Common Pleas further held:

"In light of the foregoing determination, the Court need not reach the issues of the validity of the California judgment and the applicability of the doctrine of cy pres."²

1. As noted in our Brief, The Toledo Trust Company thus appears in this action as two distinct trust fiduciaries, with distinct interests and responsibilities as to each trust. Besides being separately joined as parties to this action, the trusts are separately represented.

2. Opinion and Judgment Entry of the Court of Common Pleas, filed July 29, 1985, pp. 4-5.

But the August 26, 1987 Opinion of this Court, setting forth

“... our conclusion ... that the determination of the intent of a donee in exercising a testamentary special power of appointment by a court of competent jurisdiction of the state within which the donee is domiciled at the time of the power's exercise is binding in any subsequent judicial proceedings in Ohio and entitled to full faith and credit with respect thereto,”

and directing remand “to the trial court for further proceedings consistent with this opinion,” leaves doubt as to whether, or in what way, this Court has determined the fundamental issue presented by the terms of the trust agreement, as well as by the pleadings and by the judgment of the Court of Common Pleas—the issue of whether the power of appointment was “effectively exercised.”

Accordingly, by this Motion for Rehearing, The Toledo Trust Company as Trustee of Trust No. 4117 respectfully seeks clarification of the rulings made in this Court's August 26, 1987 Opinion, in order to provide the trial court with appropriate direction as to the conduct of further proceedings on remand.

Respectfully submitted,

/s/ DONALD F. MELHORN, JR.

*Attorney for The Toledo Trust
Company, as Trustee of Trust
No. 4117*

MARSHALL & MELHORN
Four SeaGate, Eighth Floor
Toledo, Ohio 43604
(419) 249-7100

**MEMORANDUM OF APPELLEES THE TOLEDO TRUST
COMPANY AS TRUSTEE OF TRUST NO. 4118 AND
NANCY S. JONES IN SUPPORT OF MOTION FOR
REHEARING FILED IN THE SUPREME COURT
OF OHIO**

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

MEMORANDUM OF APPELLEES THE TOLEDO TRUST
COMPANY AS TRUSTEE OF TRUST NO. 4118 AND
NANCY S. JONES IN SUPPORT OF MOTION
FOR REHEARING

Appellees, The Toledo Trust Company, as Trustee of Trust No. 4118 and Nancy S. Jones, join in the Motion for Rehearing of The Toledo Trust Company as Trustee of Trust No. 4117, for clarification of the effect of the Court's holdings in its August 26, 1987 Opinion.

No standard for rehearing for clarification, or rehearing generally, is established in the Supreme Court Rules of Practice or the case law, but reconsideration generally is appropriate when the request calls to the attention of the Court an obvious error in its decision, or raises an issue for the Court's consideration that was not considered at all, or was not fully considered by it when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App. 3rd 140. For two reasons, these findings are evident in light of the Court's holding on the full faith and credit issue in its Opinion.

First, the issue has not been the subject of genuine contention below. Neither the trial court nor the Court of Appeals discussed or decided the issue. The trial court found that in light of its determination of the threshold inquiry, a question of trust construction, the question of the validity of the California judgment was moot. The Court of Appeals did not even *consider* the validity of the California judgment and the effect it should be given in Ohio courts. Furthermore, neither of Santa Barbara Foundation's propositions of law in its brief address the full faith and credit issue even remotely, and only one paragraph of its brief, at pp. 23-24, discusses the issue, without citation to legal authority. The question of whose intention controls in determining whether a power

is effectively exercised is the issue which has been disputed and decided below and which came to this Court for ultimate resolution. The additional holding on the full faith and credit issue, without the benefit of analysis by the trial or appellate courts or significant briefing by the parties, seems unwarranted.

Second, and more important, by its Opinion the Court has seemingly ordered the Court of Common Pleas to carry out the decree of the California court on remand. The Appellees concede that the decision of the California court concerning the *validity* of the Rivas will, and even concerning the *determination of her intention* in making the disposition of assets is the proper and exclusive province of the California probate court. If, however, by the Court's holding the trial court is *effectively ordered* to carry out the decedent's intention by further decreeing distribution of the trust funds to Santa Barbara Foundation, that determination is squarely at odds with the constitutional principles of due process and full faith and credit announced by the United States Supreme Court in *Hanson v. Denckla* (1958), 357 U.S. 235. The California decree determined that Santa Barbara Foundation was entitled to the renounced appointive assets. If by its holding this Court is ordering the Court of Common Pleas to honor that decree, the *effect* of that decision is to order distribution of the assets, thereby divesting the vested interest of the taker in default by means of a proceeding in which the California probate court did not, and could not, obtain jurisdiction over the trustee, the trust assets, or the taker in default. *Hanson v. Denckla* positively prohibits such a result.

A brief review of *Hanson v. Denckla* is instructive. A Florida domiciliary, after executing a trust agreement in Delaware and a will exercising a power of appointment over the Delaware trust assets in Florida, died in Florida. A declaratory judgment action was filed in the Florida trial court, which held that it lacked jurisdiction over non-residents, including the trustees, who were "constructively" served, but did not appear. The Florida Supreme Court reversed in part, holding that the non-residents were within the jurisdiction of the court and that the residuary clause under the will governed distribution of the trust assets (100 So.2d 378). A separate action was brought in the Delaware Court of Chancery for a declaration as to who was entitled to the trust assets, and it was held that the exercise of the power of appointment was valid, that the trust assets passed thereunder, and that the Florida judgment was not entitled to full faith and credit. The Delaware Supreme Court affirmed. (128 A.2d 819.) The United States Supreme Court affirmed the judgment of the Delaware Supreme court.

The Court initially determines that the action is one "in rem" inasmuch as the true subject of the litigation were the trust assets held by the Delaware trustee. At p. 246, Chief Justice Warren, speaking for the majority, said,

The basis of the [in rem] jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.

The assets of Trust No. 4117 were located in Ohio at all relevant times. The Court then continued:

The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and

construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called "in rem" jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of the inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the state nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. (citations omitted). The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, *this Court has rejected the suggestion that the probate decree of the State where a decedent was domiciled has an in rem effect on personalty outside the forum state that could render it conclusive on the interests of non-residents over whom there was no personal jurisdiction. Riley v. New York Trust Co.*, 315 US 343, 353, 86 L ed 885, 893, 62 S Ct 608; *Baker v. Baker, E. & Co.* 242 US 394, 401, 61 L ed 386, 391, 37 S Ct 152, *Overby v. Gordon*, 177 US 214, 44 L ed 741, 20 S Ct 603. The fact that the owner is or was domiciled within the forum state is not a sufficient affiliation with the property upon which to base jurisdiction in rem. (Id., at 247-249) (emphasis added)

The Court continues by holding that a judgment purporting to govern the distribution of trust assets over which the court rendering the judgment lacked jurisdiction is invalid, stating at p. 250:

Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction.

Here, the California decree purports to determine the entitlement of Ohio trust assets over which it admittedly had no jurisdiction. This Court's holding that the California judgment did not purport to rest upon jurisdiction over the trust assets, and inferentially the trustee and taker in default, simply cannot be squared with the fact that the apparent intended effect of this holding will compel the Court of Common Pleas to order distribution of the trust assets to Santa Barbara Foundation. The California proceedings here and the Florida proceeding in *Hanson* each suffered from the same jurisdictional defects, defects which the U. S. Supreme Court held nullified the validity of the Florida judgment, but which this Court has held to have no effect on the validity of the California judgment.

If the Court's holding in fact compels distribution of the trust funds to Santa Barbara Foundation in accordance with the California decree, Ohio will be rendered a most inhospitable jurisdiction in which to engage in trust business. Only Ohio trustees and beneficiaries under Ohio trusts will be forced to travel across the country voluntarily to appear and defend lawsuits which affect the trust assets, the trustee or beneficiary, even where there are *no* contacts otherwise with the forum state. This cannot be an intended result of the Court's August 26, 1987 Opinion, but it will be the case.

For the foregoing reasons, these Appellees urge the Court to grant The Toledo Trust Company as Trustee of Trust No. 4117's Motion for Rehearing.

Respectfully submitted,

ROBISON, CURPHEY & O'CONNELL

/s/ MICHAEL S. MESSENGER

Ninth Floor, Four SeaGate

Toledo, Ohio 43604

*Attorneys for Defendants-Appellees
The Toledo Trust Company,
Trustee of Trust No. 4118 and
Nancy S. Jones*

MOTION FILED
FEB 4 1988

4

No. 87-1132

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118 AND THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Petitioners,
vs.
SANTA BARBARA FOUNDATION,
Respondent.

**On Petition For Writ Of Certiorari
To the Ohio Supreme Court**

**MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF
OF THE OHIO BANKERS ASSOCIATION TRUST
DIVISION AS AMICUS CURIAE IN SUPPORT OF
PETITION**

NANCY L. SPONSELLER
Counsel of Record
BENJAMIN B. SEGEL
JERRY M. VELTMANN
SPONSELLER & SEGEL
2727 Tuller Parkway, Suite 150
Dublin, Ohio 43017
(614) 764-0423

Of Counsel:
JEFFREY D. QUAYLE
51 North High Street
Columbus, Ohio 43215
(614) 221-5121

Attorneys for Amicus Curiae
The Ohio Bankers Association
Trust Division

General Counsel for
Amicus Curiae
The Ohio Bankers Association
Trust Division

February 4, 1988

40 pp

**MOTION FOR LEAVE TO FILE BRIEF OF THE OHIO
BANKERS ASSOCIATION TRUST DIVISION AS AMICUS
CURIAE IN SUPPORT OF PETITION**

The Ohio Bankers Association Trust Division, as *Amicus Curiae*, hereby respectfully moves for leave to file the attached Brief in Support of Petition For Writ of Certiorari.¹

The Ohio Bankers Association Trust Division is a statewide association representing the interests of both state and national banks. As a statewide trade association, it is the spokesman for nearly every corporate, commercial trustee in the State of Ohio, and its perspective is broader and quite different from that of the parties. Accordingly, the arguments that this *Amicus Curiae* advances will be markedly different than those advanced by the parties. Unquestionably, the decision of the Ohio Supreme Court will have a detrimental impact on each and every trustee in Ohio, whether the trustee is an individual or a corporate, commercial fiduciary. If the decision below is allowed to stand, all trustees will be forced to meet an unparalleled burden requiring the appearance and the defense of their respective trust's interests in any State, regardless of where the trustee is located and administering the trust assets, regardless of where the trust assets are located, without service of summons and complaint upon the trustee, and without the existence of even a colorable claim of jurisdiction over the trustee or the trust assets. Each and every

¹ The consent of the Petitioners has been obtained. The consent of the Respondent was requested but refused. (See attached Appendix A1-A7.) *Amicus Curiae's* requests for consent, Petitioners' consents and Respondent's refusal have been filed with the Clerk of this Court.

II

individual and corporate fiduciary has a very real and important interest in this case, an interest that can best be presented only by the Ohio Bankers Association Trust Division.

Respectfully submitted,

NANCY L. SPONSELLER

Counsel of Record

SPONSELLER & SEGEL

2727 Tuller Parkway, Suite 150

Dublin, Ohio 43017

(614) 764-0423

Attorneys for *Amicus Curiae*

The Ohio Bankers Association

Trust Division

III

QUESTIONS PRESENTED

1. WHETHER PETITIONERS, WHO ARE, RESPECTIVELY, AN OHIO BENEFICIARY CLAIMANT OF TRUST PROPERTY, AND THE OHIO TRUSTEE HOLDING AND ADMINISTERING SUCH PROPERTY, WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT BASED UPON THE OHIO SUPREME COURT'S FINDING THAT THE CALIFORNIA COURT WAS A "PROPER FORUM."
2. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE THERE ARE NO CONTACTS BETWEEN PETITIONERS AND CALIFORNIA.
3. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE THE TRUST ASSETS WERE LOCATED IN OHIO, NOT CALIFORNIA.

IV

4. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE PETITIONERS WERE PROVIDED ONLY WITH NOTICE INDICATING THAT THE CALIFORNIA PROCEEDING WAS CONFINED TO A DETERMINATION OF ENTITLEMENT TO SHARE IN AN ESTATE OF WHICH THE TRUST ASSETS WERE NOT A PART.
5. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE THE PETITIONERS WERE NOT MADE PARTIES OR SERVED WITH SUMMONS AND COMPLAINT IN THE CALIFORNIA PROCEEDING.
6. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW AND WERE FURTHER DENIED THE PROTECTION AFFORDED UNDER THE CONTRACT CLAUSE, BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT,

WHERE THE CALIFORNIA JUDGMENT DEROGATED THE TERMS OF AN IRREVOCABLE OHIO TRUST.

VI

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF <i>AMICUS CURIAE</i>	I
QUESTIONS PRESENTED	III
TABLE OF AUTHORITIES	VIII
BRIEF OF <i>AMICUS CURIAE</i> IN SUPPORT OF PETITION	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
HOW FEDERAL QUESTIONS WERE RAISED AND PASSED UPON BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I Introduction	6
II The Ohio Supreme Court Misapplied The Full Faith And Credit Doctrine, Thereby Denying Due Process Of Law To The Toledo Trust Company, Because The California Court Lacked Jurisdiction	7
A. Full Faith And Credit Cannot Be Given To The California Judgment Based Upon Only The Ohio Supreme Court's Finding That California Was A "Proper Forum"	7
B. The California Court Lacked Jurisdiction Over The Toledo Trust Company Due To The Absence of "Minimum Contacts" ...	9

VII

C. The Toledo Trust Company Was Admin- istering Trust Assets That Were Located Within Ohio, Not California, And, Thus, Were Beyond The Jurisdiction of The Cal- ifornia Court	12
D. The Notice Sent To The Toledo Trust Company Was Insufficient In That It Was Not Fully Descriptive	15
E. The Toledo Trust Company Was Not Made A Party To The California Pro- ceedings And Was Not Served With Sum- mons	16
F. Contract Rights Of The Toledo Trust Company And Of The Trust's Grantor Were Impaired	18
CONCLUSION	19

APPENDIX:

Letter from Jeffrey D. Quayle to Donald F. Melhorn, Jr., dated January 8, 1988	A1
Letter from Donald F. Melhorn, Jr. to Jef- frey D. Quayle, dated January 11, 1988	A2
Letter from Jeffrey D. Quayle to E. Thomas Maguire, dated January 8, 1988	A3
Letter from E. Thomas Maguire to Jeffrey D. Quayle, dated January 11, 1988	A4
Letter from Jeffrey D. Quayle to John J. McHugh, III, dated January 8, 1988	A5
Letter from John J. McHugh, III, to Jeffrey D. Quayle, dated January 11, 1988	A6
California Civil Code Section 1390.2 (Deer- ing)	A8

VIII

TABLE OF AUTHORITIES

CASES	Page
<i>Arizona Governing Committee v. Norris</i> , 463 U.S. 1073 (1983)	19
<i>Baker v. Baker, Eccles & Company</i> , 242 U.S. 394 (1917)	13,14,17
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	12
<i>De Olazabal v. Mix</i> , 24 Cal. App.2d 258, 74 P.2d 787 (1937)	10
<i>Durfee v. Duke</i> , 375 U.S. 106 (1963)	8,9
<i>Estate of Baird</i> , 120 Cal. App.2d 219 (1953)	4
<i>Estate of Masson</i> , 142 Cal. App.2d 510 (1956)	4
<i>Estate of Rosecrans</i> , 4 Cal.3d 34 (1971)	4
<i>Fall v. Eastin</i> , 215 U.S. 1 (1909)	13
<i>Fraser-Yamor Agency, Inc. v. Del Norte County</i> , 68 Cal. App.3d 201, Cal. Rptr. 118 (1977)	13
<i>Greene v. Lindsey</i> , 456 U.S. 444 (1982)	16
<i>Hanson v. Denckla</i> ., 357 U.S. 235 (1958)	9,10,11,12,13,14
<i>Helicopteros Nacionales de Colombia v. Hall</i> , 466 U.S. 408 (1984)	12,14
<i>Home Insurance Company v. Dick</i> , 281 U.S. 397 (1930)	18
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	10,13
<i>Kulko v. California Superior Court</i> , 436 U.S. 84 (1978)	11,14,18
<i>Mennonite Board of Missions v. Adams</i> , 462 U.S. 791 (1983)	16
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	16
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	8
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	19

IX

Table of Authorities Continued

	Page
<i>Omni Capital International v. Rudolph Wolff and Co., Ltd.</i> — U.S. —, 56 U.S.L.W. 4031 (1987)	16,17
<i>Overby v. Gordon</i> , 177 U.S. 214 (1900)	14
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	16
<i>Power v. Ashton</i> , 45 Cal. App.3d 783, 119 Cal. Rptr. 729 (1975)	10
<i>Riley v. New York Trust Co.</i> , 315 U.S. 343 (1942)	13
<i>Shaffer v. Heitner</i> , 433 U. S. 186 (1977)	13,14
<i>Tidal Oil Company v. Flanagan</i> , 263 U.S. 444 (1924)	19
<i>Underwriters National Assurance Co. v. North Carolina Life Guarantee Ass'n.</i> , 455 U.S. 691 (1982)	8,9
<i>United States Trust Company of New York v. New Jersey</i> , 431 U.S. 1 (1977)	19
<i>Western Union Telegraph Co. v. Pennsylvania</i> , 368 U.S. 71 (1961)	12-13
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	11,12,14

CONSTITUTION AND STATUTES

U. S. Constitution, Article I, § 10, Clause 1	2,19
U. S. Constitution, Article IV, § 1	8,13
U. S. Constitution, First Amendment	19
28 U.S.C § 1738	8
California Probate Code § 1200.5 (Deering)	4
California Civil Code § 1390.2 (Deering)	2,4,15



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-1132

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118 AND THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Petitioners,

vs.

SANTA BARBARA FOUNDATION,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION

The Ohio Bankers Association Trust Division, as *Amicus Curiae*, respectfully requests that a Writ of Certiorari issue to review the judgment and decision of the Ohio Supreme Court entered on August 26, 1987.

OPINIONS BELOW

The opinions of the lower courts are reported as set forth by Petitioners in their Petition. Petitioners' statement, therefore, is adopted and incorporated herein by this *Amicus Curiae*.

JURISDICTION

The jurisdiction of this Court is as set forth by Petitioners in their Petition, and such is adopted and incorporated herein by this *Amicus Curiae*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those constitutional provisions and statutes set forth by Petitioners in their Petition, this case involves the following constitutional provision and statute:

1. U.S. Constitution, Article I, Section 10, Clause 1, provides:

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. California Civil Code Section 1390.2 (Deering) appears in the Appendix at A8 as filed by *Amicus Curiae*.

HOW FEDERAL QUESTIONS WERE RAISED AND PASSED UPON BELOW

The statements of the Petitioners are adopted and incorporated herein by this *Amicus Curiae*.

STATEMENT OF THE CASE²

In 1960, The Toledo Trust Company entered into a contract with Nancy S. Jones pursuant to which there was created an irrevocable trust for Nancy S. Jones' daughter, Marcia Rivas, as income beneficiary. This contract, known as Trust No. 4117, expressly provided that,

This agreement and all of the trust assets held in trust hereunder shall be subject to and held,

² This statement is supplemental to the statement of the case contained in the Petition For Writ of Certiorari filed by Petitioners and is not intended to be a complete restatement of the case.

administered and distributed in accordance with the laws of the State of Ohio. A65.³

Trust No. 4117 also provided that upon Marcia Rivas' death, the principal was to be distributed as Marcia Rivas "may by her Last Will and Testament appoint," and, to the extent that she failed effectively to exercise the power of appointment, the trust assets would be added to and become a part of Trust No. 4118, which Nancy S. Jones had established, also by contract with The Toledo Trust Company, for another daughter. A50.

At all times The Toledo Trust Company has held and administered the trust assets in the State of Ohio in accordance with Ohio law. A44. The trust assets never attained a *situs* outside of Ohio. Nor does the record reveal that The Toledo Trust Company ever performed any act or engaged in any conduct of any nature in the State of California.

Marcia Rivas died a resident of California and her Will was accordingly admitted to probate in the Superior Court of California, County of Santa Barbara, under Case No. SM 38985 in probate proceedings captioned "In the Matter of the Estate of Marcia MacDonald Rivas, aka Marcia MacDonald, Deceased." A44. In her Will, Marcia Rivas attempted to exercise the special power of appointment of the assets held by The Toledo Trust Company in Trust No. 4117. A70. Although the attempt to exercise the special power was made by Marcia Rivas in her Last Will, under well established California law, this fact did not transform the trust assets into probate assets regardless of whether the attempt to exercise the power was effective or ineffective.⁴

³ Unless otherwise noted, all references to the Appendix are to the Appendix filed by Petitioners.

⁴ Rather, if the power was effectively exercised, the trust assets would pass outside of the probate estate by direct transfer from the

On September 16, 1983, Santa Barbara Foundation filed in the Rivas' Estate a "Petition For Determination of Entitlement To Distribution of Estate." The Petition represented that Alcoholics Anonymous, an appointee of a portion of the trust assets pursuant to the decedent's attempted testamentary exercise of the special power, did not "... qualify under Probate Code Section 27 as a person or organization capable of taking a testamentary disposition by Will," that Alcoholics Anonymous was unable to accept the assets appointed to it under the Will of decedent, and that in order to carry out "the intent" of Marcia Rivas and "fulfill" the purpose of the trust and power of appointment exercised under her Will to Alcoholics Anonymous, said gift should be made payable to the Santa Barbara Foundation. A76-A79.

Although Santa Barbara Foundation additionally recited in its Petition that "... various persons and organizations claimed an interest in the estate of decedent and the property in trust . . .," (A78-A79) none of these interested persons and organizations, including The Toledo Trust Company, were made a party to this proceeding. The Toledo Trust Company was never served with any summons and complaint, or any other process by which the California court might have purported to obtain personal jurisdiction over it. Rather, The Toledo Trust Company only received a notice, dated September 16, 1983, that a hearing was scheduled for October 6, 1983. This notice, issued pursuant to California Probate Code Section 1200.5 pro-

grantor of the power (i.e., Nancy S. Jones) to the appointee. *Estate of Baird*, 120 Cal. App.2d 219, 227-229 (1953); *Estate of Masson*, 142 Cal. App.2d 510 (1956); also see *Estate of Rosecrans*, 4 Cal.3d 34 (1971), footnote 4 at page 38. On the other hand, if the power was ineffectively exercised, the trust assets would pass pursuant to the terms of Trust No. 4117 to Trust No. 4118. *Estate of Baird, supra*, at 227. Furthermore, under California statutory law, the trust assets that were the subject of the special power were not subject to the claims of creditors of Marcia Rivas' estate or to the expenses of estate administration. California Civil Code Section 1390.2 (Deering).

viding for notice to parties "interested" in probate proceedings, advised The Toledo Trust Company that it could attend if it wished, but was not required to do so. A86-A87.

After Santa Barbara Foundation filed its Petition and notice of hearing was sent to those interested parties, Alcoholics Anonymous filed a document captioned "Declaration of Declination of Bequest and Appointive Assets," wherein Alcoholics Anonymous stated that it was declining to accept the bequest and appointment of ten (10%) percent of the trust assets (of Trust No. 4117) except the amount of \$500.00. A74-A75.

At the October 6, 1983 hearing only Santa Barbara Foundation appeared. Consequently, the record reflects no hearing whatsoever, but only an Order dated and filed with the court on October 13, 1983. This Order specifically directed that,

10% of the assets of [the] Trust . . . is hereby ordered distributed to Santa Barbara Foundation, to be held and administered as a charitable Trust. . . .⁵ A97-A98.

Although this Order was entered in a proceeding initiated by the filing of a "Petition For Determination of Entitlement To Estate Assets," it most notably does not provide for any distribution of estate assets, any distribution of assets to the estate executor for administration as estate assets, or any distribution of assets to beneficiaries of the probate estate. Instead, the Order directs distribution of trust assets to Santa Barbara Foundation, as successor trustee to The Toledo Trust Company, and establishes entirely new and different terms and conditions

⁵ The amount of ten (10%) percent of the assets is the exact total amount which Marcia Rivas had previously attempted to appoint to Alcoholics Anonymous with no adjustment for the \$500.00 that Alcoholics Anonymous was willing to accept.

for the administration of such trust assets. Of critical importance is the absence of any findings with respect to the court's own jurisdiction—either jurisdiction over the trust assets or over The Toledo Trust Company as trustee. Equally critical is the absence of any specific finding with respect to the decedent's testamentary intent.

The Toledo Trust Company, as trustee of Trust No. 4117, then filed suit in the Common Pleas Court of Lucas County, Ohio, to seek a determination of its rights and obligations given the then conflicting claims of Santa Barbara Foundation, arising by virtue of the California order, and of Trust No. 4118, as the taker-in-default designated in Trust No. 4117. A35-A37. The proceedings in the trial court, the court of appeals and the Ohio Supreme Court are as set forth by the Petitioners. Clearly, the proceedings in Ohio concluded in the Ohio Supreme Court with that court's holding that the California Order was entitled to full faith and credit in Ohio and was binding on The Toledo Trust Company, notwithstanding a vigorous dissent written by Justice Locher, who was of the firm opinion that,

The California superior court in this case had no jurisdiction over either The Toledo Trust Company, the trustee, or the trust assets. The mere fact that notice of the hearing in the California superior court was mailed to Toledo Trust does not subject Toledo Trust to the jurisdiction of that court. A11-A12.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Ohio Supreme Court judgment not only ignores but also attempts to abrogate every United States Supreme Court decision within the past thirty (30) years that collectively establish and define not only the standards governing the application of the full faith and credit doctrine but also the standards of due process—standards that are

constitutional limitations upon a State court's invocation of jurisdiction. If this judgment remains intact, a State court's jurisdiction may be predicated upon no more than 1) the mailing of a notice, rather than the service of summons and complaint, 2) to an interested party, rather than a named defendant, 3) who has no contact with the forum State, rather than minimum contacts.

In the context of trust administration, an additional result will be the impairment of established contract rights of trustees and trust grantors specifying who shall serve as trustee and under what State's law trust assets are to be held, administered and distributed. Henceforth, trustees will face an unparalleled and unconstitutional burden to appear at every hearing in any State regardless of where the trustee resides, does business or administers the assets. This burden cannot be met by trustees, whether a commercial bank or an individual. Simply stated, the Ohio Supreme Court decision is of dangerous precedence to trust administration, and, indeed, to the federalist underpinning of our judicial system.

II. THE OHIO SUPREME COURT MISAPPLIED THE FULL FAITH AND CREDIT DOCTRINE, THEREBY DENYING DUE PROCESS OF LAW TO THE TOLEDO TRUST COMPANY, BECAUSE THE CALIFORNIA COURT LACKED JURISDICTION.

A. Full Faith and Credit Cannot Be Given To The California Judgment Based Upon Only The Ohio Supreme Court's Finding That California Was A "Proper Forum."

The decision of the Ohio Supreme Court omits any recitation or consideration of the profoundly relevant and fundamental principles governing the application of the full faith and credit doctrine. Beyond this, the Ohio Supreme Court creates a new rule: once it is determined that the California court was a "proper forum" to address the subject matter of the testamentary intent of a California dom-

iciliary, then with no further inquiry made, the California judgment is entitled to full faith and credit.

The decision of the California superior court merely sought to ascertain and give effect to the testamentary intent of a California domiciliary. As mentioned above, it was a proper forum to make this determination. Once rendered, the judgment was entitled to full faith and credit in any subsequent Ohio proceeding governing the disposition of the trust assets. A9.

A Writ of Certiorari should issue if only to address the Ohio Supreme Court's erroneous holding which in effect is a pronouncement of a new "proper forum" test as the sole basis for determining when full faith and credit should be given to a foreign State court's judgment.⁶

Issuance of the Writ would serve to reaffirm this Court's previously announced principles defining the full faith and credit doctrine. First, the full faith and credit provisions of the United States Constitution (Article IV, § 1) and its statutory codification (28 U.S.C. § 1738) require that the courts of one State treat as conclusive the judgments of a forum State's courts "... only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment," *Durfee v. Duke*, 375 U.S. 106, 110 (1963). Second, full faith and credit may only be afforded those judgments rendered with jurisdiction over the subject matter and the parties to be bound. *Underwriters National Assurance Co. v. North Carolina Life Guarantee Ass'n.*, 455 U.S. 691 (1982); *Nevada v. Hall*, 440 U.S. 410 (1979). Third, a forum State's judgment may not be afforded preclusive effect against entities that

⁶ If this Court is not disposed to grant certiorari for any of the reasons advanced, this *Amicus Curiae* respectfully suggests that the Ohio Supreme Court's misuse of the full faith and credit doctrine renders this an appropriate case for the Court to reverse summarily.

were not parties (or their privies) to the forum court's proceeding, *Durfee v. Duke*, *supra*, or whose interests were not fully represented by such parties. *Underwriters National Assurance Co. v. North Carolina Life Guarantee Ass'n.*, *supra*. Fourth,

... a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. *Durfee v. Duke*, 375 U. S., at 111.

In the instant matter, the Ohio court erred by applying the full faith and credit doctrine so as to make the California judgment binding on trustees over which the California court had no jurisdiction, which were not parties or privies to the California proceeding, whose interests were not represented in any manner in that proceeding, and where the Ohio court made no inquiry as to what had been fully and fairly litigated and finally decided in California. Had inquiry been made, it would have disclosed that no questions, including jurisdictional issues, had been fully and fairly litigated in California. Such inquiry would have disclosed additionally that the California court did not decide what Marcia Rivas' testamentary intent was, but rather directed the disposition of trust assets located in Ohio and held by an Ohio trustee.

B. The California Court Lacked Jurisdiction Over The Toledo Trust Company Due To The Absence Of "Minimum Contacts."

The erroneous nature of the Ohio decision is best highlighted by reference to the substantially similar case of *Hanson v. Denckla*, 357 U.S. 235 (1958). In *Hanson*, this Court considered a Delaware judgment which refused to afford full faith and credit to a Florida judgment holding that a trust agreement and power of appointment were

ineffective, so that trust assets passed under the residuary clause of a decedent's Will and not pursuant to the decedent's exercise of the power of appointment granted by the trust agreement. This Court held, in part, that the Delaware judgment correctly denied preclusive effect to the Florida judgment, because the Florida court lacked *in personam* jurisdiction over the trustee.

The *Hanson* court recognized that, under Florida law, the non-resident trustee was an indispensable party to the litigation.⁷ The proponents of the Florida judgment argued that it was binding upon the non-resident trustee by virtue of notice which had been published in Florida, and by virtue of mailing to the trustee a copy of pleadings and a "Notice To Appear and Defend". However, this Court stated that jurisdiction could only be asserted over the trustee, consistent with due process requirements, if the trustee had sufficient "minimum contacts" with Florida, pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). For the Delaware trustee to be bound by the Florida judgment, there had to be some act(s) by which the trustee had "... purposefully avail[ed] itself of the privilege of conducting activities within the forum State,

⁷ Not surprisingly, California law likewise would appear to render the trustee an indispensable or necessary party to proceedings which, as herein, dispose of trust assets. Under California law, an express trust is not an entity separate from the trustee, who is the real party in interest in litigation concerning the trust, *Powers v. Ashton*, 45 Cal. App.3d 783, 119 Cal. Rptr. 729 (1975), and a necessary party to litigation involving the relations of trustee and beneficiaries, *De Olazabal v. Mix*, 24 Cal. App.2d 258, 74 P.2d 787 (1937). In general, persons whose interests or duties will inevitably be affected by an adjudication are indispensable parties, without whom the court lacks jurisdiction to proceed. Cal. Civ. Proc. Code Section 389 (Deering); *Fraser-Yamor Agency, Inc. v. Del Norte County*, 68 Cal. App.3d 201, 137 Cal. Rptr. 118 (1977). Respondent herein can hardly be heard to argue that the California judgment, which requires distribution of Ohio trust assets, does not inevitably affect the interests or duties of the Ohio trustee.

thus invoking the benefits and protections of its laws." 357 U.S., at 253.

This Court concluded that the Delaware trustee lacked such minimum contacts, and therefore was not subject to the jurisdiction of the Florida court. Thus, the Delaware trustee could not be bound by the Florida court's judgment in the subsequent Delaware action. The factors upon which this Court's conclusion rested apply with equal force to The Toledo Trust Company, so far as the record herein discloses:

The . . . trust company has no office in [California], and transacts no business there. None of the trust assets has ever been held or administered in [California], and the record discloses no solicitation of business in that State either in person or by mail. 357 U.S., at 251.

Following *Hanson*, this Court on numerous occasions again has addressed the issue of when a State court may assert *in personam* jurisdiction over a non-resident defendant such that "traditional notions of fair play and substantial justice" are not offended. While this *Amicus* would assert that every decision on the subject of *in personam* jurisdiction and minimum contacts which this Court has ever issued now compels this Court to find, as did the Ohio Supreme Court's dissenter, that The Toledo Trust Company could not and should not be bound by the California judgment, another decision of this Court is particularly illustrative. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this Court held that an Oklahoma court could not exercise *in personam* jurisdiction over New York corporations where they did no business in Oklahoma and where there was a total absence in the record of any affiliating circumstances between the defendants and the forum state. See also, *Kulko v. California Superior Court*, 436 U. S. 84 (1978).

This *Amicus* simply asks: if an attempt to exercise *in personam* jurisdiction over the Delaware trustee in *Hanson* and over the "distant" defendants in *World-Wide Volkswagen* violate due process, how can binding The Toledo Trust Company to the California judgment not be equally violative? The Ohio judgment permits The Toledo Trust Company, which has no contacts with California, to be "haled into court" in California solely as a result of the unilateral activity of another. Such a result violates The Toledo Trust Company's due process rights. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

C. The Toledo Trust Company Was Administering Trust Assets That Were Located Within Ohio, Not California, And, Thus, Were Beyond The Jurisdiction of The California Court.

Because jurisdiction was never an issue litigated in California's proceedings and, correspondingly, there is no specific finding by the California court as to the basis of its jurisdiction, Respondent may argue alternatively that jurisdiction is not *in personam* but rather is *in rem* or *quasi in rem*. However, such a distinction, if made, does not result in any different constitutional analysis, and, moreover, is no longer an appropriate distinction.

Certainly the *Hanson* decision drew a distinction between jurisdiction *in rem* over trust assets and jurisdiction *in personam* over the trustee. The *Hanson* court found *in rem* jurisdiction lacking because, as is the case herein, the trust assets were situated and administered outside the forum State. The Ohio Supreme Court judgment is similarly flawed in that it permits the California judgment to operate expressly and directly on assets located beyond the jurisdiction of the California court. This Court has long and repeatedly recognized the inability of a forum State's judgment to operate dispositively on assets outside the forum State. *Western Union Telegraph Co. v. Pennsylv-*

nia, 368 U. S. 71 (1961); *Riley v. New York Trust Co.*, 315 U. S. 343 (1942); *Baker v. Baker, Eccles & Company*, 242 U. S. 394 (1917); *Fall v. Eastin*, 215 U. S. 1 (1909).

No longer, however, is the distinction between jurisdiction *in rem* and jurisdiction *in personam* one of any substantive meaning, at least with respect to constitutional due process standards. Subsequent to *Hanson*, this Court determined that all assertions of jurisdiction should be judged against the *International Shoe* minimum contacts standard, whether such jurisdiction is characterized as being *in personam*, *in rem*, or *quasi in rem*. *Shaffer v. Heitner*, 433 U. S. 186 (1977).

Furthermore, it should be recognized that although the California judgment arose in a probate context, which some may view as an *in rem* proceeding, and ostensibly was brought to construe a domiciliary's attempted exercise of a testamentary power of appointment, those facts do not validate the California judgment or Ohio's subsequent grant of full faith and credit. First, it must be recalled that the California judgment did not simply construe a domiciliary's attempt to exercise a power of appointment; rather, the California court expressly ordered the distribution of trust assets held and administered in Ohio, in a manner contrary to that provided by the Ohio trust agreement. That the California proceeding was incident to an estate administration does not entitle that court's judgment to preclusive effect with respect to parties or assets over which the court lacked jurisdiction. In *Riley v. New York Trust Co.*, *supra*, this Court held that the Full Faith and Credit Clause did not require that a State, in disposing of local assets, give preclusive effect to a sister State's adjudication of domicile for probate purposes, stating:

While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judg-

ment extra-territorial effect upon assets in other states. 315 U. S., at 353.

In short, the general rule that a forum State's judgment cannot operate to bind parties or dispose of assets over which the forum court lacks jurisdiction applies equally to judgments rendered in probate proceedings. *Baker v. Baker, Eccles & Company, supra*. Accord, *Overby v. Gordon*, 177 U. S. 214 (1900). See also, *Hanson v. Denckla, supra*.

Notwithstanding the Ohio court's finding that California was the "proper forum," neither California's interests in the administration of its domiciliaries' estates nor any purported convenience of that forum to litigate issues that may touch such administration permit that State's judgments to enjoy extra-territorial effect. The strength of a State's interests or the convenience of that forum are not dispositive in determining the extent of the forum court's jurisdiction. *World-Wide Volkswagen Corp. v. Woodson, supra*. While such considerations may be important for choice of law purposes, they cannot serve as a basis for jurisdiction. *Helicopteros Nacionales de Colombia v. Hall, supra*; *Kulko v. California Superior Court, supra*. Moreover, although a non-resident's submission to the jurisdiction of a forum court would undoubtedly simplify the proceedings,

... the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' That cost is too high. *Shaffer v. Heitner*, 433 U.S., at 211.

In the instant case, the California court ordered the transfer to California of trust assets held and administered in Ohio pursuant to a trust agreement entered into in Ohio and governed by Ohio law. The Ohio court then denied due process to the Ohio trustee and the taker-in-default by affording the California judgment extra-territorial and

preclusive effect with respect to trust assets located beyond the forum court's jurisdiction.

D. The Notice Sent To The Toledo Trust Company Was Insufficient In That It Was Not Fully Descriptive.

In an attempt to bind The Toledo Trust Company and give preclusive extra-territorial effect to a judgment ordering distribution of Ohio trust assets, the California court mailed to The Toledo Trust Company a "Notice of Hearing (Probate)," which indicated simply that Santa Barbara Foundation had filed a "Petition For Determination of Entitlement To Distribution of Estate" of Marcia Rivas, and that a hearing on the matter would be held October 6, 1983, at which time The Toledo Trust Company could appear if it chose to do so. A68-A69. Promptly thereafter, on October 13, 1983, the California court entered judgment ordering distribution of the Ohio trust assets.

The Notice issued by the California court did not adequately advise The Toledo Trust Company (either as trustee or as the taker-in-default) that its own interests or the interests of trust beneficiaries might be affected, or that trust assets might somehow be distributed. Indeed, the Notice was plainly misleading; it described the nature of the hearing as "Probate," and referenced Respondent's Petition, brought ostensibly to determine entitlement to share in a probate estate. However, the Ohio trust assets were *not estate* assets. Under California law, trust assets subject to a power of appointment pass directly from the donor of the power to the appointee or to a taker-in-default; they are not a part of the donee's estate,^a nor subject to the claims of estate creditors or the expenses of estate administration. California Civil Code Section 1390.2 (Deering).

This Court has held that:

^a See footnote 4.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted.] The notice must be of such nature as reasonably to convey the required information *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

To comport with due process, such notice must be "fully descriptive," i.e., "... should describe the action and the [parties'] rights in it." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Characterizing the proceedings as *in rem*, rather than *in personam*, does not relax this notice requirement. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Such notice must still be sufficient to apprise interested persons that their interests may be affected. *Greene v. Lindsey*, 456 U.S. 444 (1982). The notice provided herein, indicating simply that the court would hear a petition to determine entitlement to share in an estate in which the Ohio trustee had no direct or fiduciary interest, and of which the Ohio trust assets were not a part, hardly can be characterized as "fully descriptive" and sufficient to afford due process, when that hearing results in a judgment which distributes those Ohio trust assets to a new California trustee.

E. The Toledo Trust Company Was Not Made A Party To The California Proceedings And Was Not Served with Summons

This Court has held that before a person can be made a party to an action, there must be more than notice and a constitutionally sufficient relationship between the defendant and the forum—there must be service of summons. In *Omni Capital International v. Rudolph Wolff and Co., Ltd.*, ___ U.S. ___, 56 U.S.L.W. 4031 (1987), the Court

addressed the absolute necessity of service of s ummons as it relates to a court's invocation of personal jurisdiction. Speaking in terms of a federal court's exercise of personal jurisdiction, this Court, in a statement equally applicable to state courts, reaffirmed that:

Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. '[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.' *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946). Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant. *Omni Capital International v. Randolph Wolff & Co., Ltd.*, — U.S. —, 56 U.S.L.W., at 4033.

This decision in *Omni Capital International*, *supra*, is consistent with this Court's much earlier decision in *Baker v. Baker, Eccles & Company*, 242 U.S. 394, 403 (1917), wherein it is set forth:

... to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory.

It necessarily follows from these decisions that if there has *not* been service of summons, as in the case *sub judice*, the court does *not* have personal jurisdiction over an entity even if the forum court issued notice of hearing and the entity had sufficient minimum contacts with the forum.⁹

F. Contract Rights of The Toledo Trust Company And Of The Trust's Grantor Were Impaired.

The California judgment improperly derogated contract rights established by the Ohio trust agreement. Trust No. 4117 provided that, upon an ineffective exercise of the testamentary power of appointment, the trust assets should be added to and become a part of Trust No. 4118. A32. Also, the contract creating Trust No. 4117 provided that assets held thereunder should be administered and distributed by The Toledo Trust Company in accordance with Ohio law. A49. Trust No. 4117 being irrevocable, the provisions of Trust No. 4117 could not be changed by the trustee or by the trust grantor. Nonetheless, the California court essentially revoked Trust No. 4117 by ostensibly applying California law, which it construed as permitting the creation of a new, California trust, to which it ordered distribution of trust assets held by Trust No. 4117. By affording full faith and credit to a California judgment which alters contract rights established by a trust agreement that, like the trustees, has no connection to the forum, the Ohio judgment contravenes the Ohio trustees' due process rights. *Kulko v. California Superior Court, supra*.

An analogy can be drawn between the instant trust agreement and the policies of insurance and re-insurance at issue in *Home Insurance Company v. Dick*, 281 U.S. 397 (1930). In that case, a Texas statute was applied to

⁹ Not at issue here in this case are plaintiff and defendant class actions, privies to parties or those whose interests are adequately protected by parties.

vary the terms of insurance contracts subject to the law of Mexico. This Court noted that the insurance contracts and all acts relevant thereto arose in Mexico or New York, and that Texas lacked meaningful contacts with such contracts. The Court held that Texas was without power to alter the contract terms, and its attempt to impose upon the parties a different obligation from that agreed to in those contracts constituted a deprivation of property without due process of law.

Similarly, the California court's judgment impairs contract rights in a manner at least analogous to that prohibited by the Contract Clause. While this Court has held that the Contract Clause applies only to impairments of contract by legislation, *Tidal Oil Company v. Flanagan*, 263 U.S. 444 (1924), it has also recognized that judges, as well as legislators, make law, e.g., *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983). Thus, while the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," First Amendment protections have been extended beyond legislation to apply, for example, to common law libel actions, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the instant action, the California court has violated the Contract Clause's central concern for "promoting confidence in the stability of contractual obligations," *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 15 (1977), by ignoring and derogating specific terms of the Ohio trust agreement. The Ohio court then also violated the Contract Clause by affording full faith and credit to the California judgment. As such, this case may provide an opportunity, should the Court so desire, for re-examination of this Court's decision in *Tidal Oil Company v. Flanagan*, *supra*.

CONCLUSION

For the reasons set forth, the Court should grant the petition.

Respectfully submitted,

NANCY L. SPONSELLER
Counsel of Record

BENJAMIN B. SEGEL

JERRY M. VELTMANN

SPONSELLER & SEGEL

2727 Tuller Parkway, Suite 150

Dublin, Ohio 43017

(614) 764-0423

Of Counsel:

JEFFREY D. QUAYLE

51 North High Street

Columbus, Ohio 43215

(614) 221-5121

Attorneys for *Amicus Curiae*

The Ohio Bankers Association

Trust Division

General Counsel for

Amicus Curiae

The Ohio Bankers Association

Trust Division

APPENDIX

A1

TRUST DIVISION/OHIO BANKERS ASSOCIATION

51 North High Street
Columbus, Ohio 43215
Telephone 614/221-5121

January 8, 1988

Mr. Donald F. Melhorn, Jr.
Marshall & Melhorn
Four SeaGate, 8th Floor
Toledo, Ohio 43604

Dear Mr. Melhorn:

The Ohio Bankers Association Trust Division requests your permission to file an amicus curiae brief in support of the petition for certiorari in the United States Supreme Court, filed by the Toledo Trust Company in the case of *Toledo Trust Co. vs. The Santa Barbara Foundation*. This application is being made to all parties as required by Supreme Court Rule 36.

The Ohio Bankers Association is a statewide trade association representing virtually all of Ohio's commercial banks and their trust departments, which will be adversely impacted by the decision of the Ohio Supreme Court in this case. Thus we can provide the Supreme Court with valuable input from the broader perspective of the industry as a whole. Such information supplementing that of the parties in their respective briefs, may be beneficial to the court in reaching its decision.

In order to properly prepare our filing, we would appreciate your notice of acquiescence or denial as soon as it is convenient.

Sincerely,

/s/Jeffrey D. Quayle
Executive Director Trust and
General Counsel

A2

Law offices of
MARSHALL & MELHORN
Four SeaGate
Eighth Floor
Toledo, Ohio 43604

(419) 249-7100
CABLE: PATLEX TOLEDO
TELECOPIER: (419) 249-7151

January 11, 1988

Mr. Jeffrey D. Quayle
Executive Director Trust and
General Counsel
Trust Division/Ohio Bankers Association
51 North High Street
Columbus, Ohio 43215

Re: The Toledo Trust Company v.
Santa Barbara Foundation

Dear Mr. Quayle:

As Trustee of Trust No. 4117 The Toledo Trust Company consents to the filing by the Ohio Bankers Association Trust Division, as *amicus curiae*, of a brief in support of the petition to the Supreme Court of the United States for a writ of certiorari in this case.

Sincerely yours,

/s/Donald F. Melhorn, Jr.
Donald F. Melborn, Jr.

DFM/nlh

cc: Michael S. Messenger, Esq.
Benjamin B. Segel, Esq.
Jerome J. Robison, Esq.

TRUST DIVISION/OHIO BANKERS ASSOCIATION

51 North High Street
Columbus, Ohio 43215
Telephone 614/221-5121

January 8, 1988

Mr. E. Thomas Maguire
Robison, Curphey & O'Connell
Four SeaGate, 9th Floor
Toledo, Ohio 43604

Dear Mr. Maguire:

The Ohio Bankers Association Trust Division requests your permission to file an amicus curiae brief in support of the petition for certiorari in the United States Supreme Court, filed by the Toledo Trust Company in the case of *Toledo Trust Co. vs. The Santa Barbara Foundation*. This application is being made to all parties as required by Supreme Court Rule 36.

The Ohio Bankers Association is a statewide trade association representing virtually all of Ohio's commercial banks and their trust departments, which will be adversely impacted by the decision of the Ohio Supreme Court in this case. Thus we can provide the Supreme Court with valuable input from the broader perspective of the industry as a whole. Such information supplementing that of the parties in their respective briefs, may be beneficial to the court in reaching its decision.

In order to properly prepare our filing, we would appreciate your notice of acquiescence or denial as soon as it is convenient.

Sincerely,

/s/Jeffrey D. Quayle

Jeffrey D. Quayle

Executive Director Trust and General Counsel

JDQ:jlk

A4

Law Offices of
ROBISON, CURPHEY & O'CONNELL
NINTH FLOOR
FOUR SEAGATE
TOLEDO, OHIO 43604
(419) 249-7900

TELECOPIER: (419) 249-7911

January 11, 1988

Ohio Bankers Association
Trust Division
51 North High Street
Columbus, Ohio 43215

Attn: Jeffrey D. Quayle, Esq.

The Toledo Trust Co. v. Santa Barbara Foundation

Gentlemen:

This is in response to your January 8, 1988 letter requesting my consent to your filing a brief amicus curiae in *The Toledo Trust Company v. Santa Barbara Foundation*, No. 87-1132, now pending in the Supreme Court of the United States. As an attorney for The Toledo Trust Company, as Trustee of Trust No. 4118, one of the petitioners in that case, I hereby give such consent.

Very truly yours,

/s/E. Thomas Maguire
E. Thomas Maguire

ETM:lss

A5

TRUST DIVISION/OHIO BANKERS ASSOCIATION

51 North High Street
Columbus, Ohio 43215
Telephone 614/221-5121

January 8, 1988

Mr. John J. McHugh, III
Watkins, Bates & Handwork
1200 National Bank Building
Toledo, Ohio 43604-1157

Dear Mr. McHugh:

The Ohio Bankers Association Trust Division requests your permission to file an amicus curiae brief in support of the petition for certiorari in the United States Supreme Court, filed by the Toledo Trust Company in the case of *Toledo Trust Co. vs. The Santa Barbara Foundation*. This application is being made to all parties as required by Supreme Court Rule 36.

The Ohio Bankers Association is a statewide trade association representing virtually all of Ohio's commercial banks and their trust departments, which will be adversely impacted by the decision of the Ohio Supreme Court in this case. Thus we can provide the Supreme Court with valuable input from the broader perspective of the industry as a whole. Such information supplementing that of the parties in their respective briefs, may be beneficial to the court in reaching its decision.

In order to properly prepare our filing, we would appreciate your notice of acquiescence or denial as soon as it is convenient.

Sincerely,

/s/Jeffrey D. Quayle

Jeffrey D. Quayle

Executive Director Trust and General Counsel

JDQ:jlk

A6

Law Offices of
WATKINS & BATES
1200 National Bank Building
Toledo, Ohio 43604-1157

(419) 241-2100

January 11, 1988

Jeffrey D. Quayle, Esq.
Executive Director, Trust
and General Counsel
Ohio Bankers Association
51 North High Street
Columbus, Ohio 43215

Dear Mr. Quayle:

This acknowledges receipt on January 11 of your correspondence of January 8 requesting permission to file an *amicus curiae* brief in support of the petition for certiorari filed by The Toledo Trust Company, pursuant to Supreme Court Rule 36.

We understand that the Ohio Bankers Association has expressed, in writing, its objection to the decision by the Ohio Supreme Court in *The Toledo Trust Company v. Santa Barbara Foundation*. We further understand that the Ohio Bankers Association position has been discussed with and communicated to The Toledo Trust Company either directly or through counsel, and believe that its interests are adequately represented by the petition for certiorari. We will be happy to review our assessment, however, if you would provide us generally with information as to how the interests to be asserted by the Ohio Bankers Association are not set forth or represented in the petition for certiorari, and how those interests are relevant to disposition of the case.

A7

Your prompt response is requested so that we might in turn favor you with reply, permitting you to address the matter to the Court in a timely fashion.

Very truly yours,

/s/John J. McHugh, III
John J. McHugh, III

JJM:rlm

cc: Donald F. Melhorn, Jr., Esq.
Michael S. Messenger, Esq.
William F. Bates, Esq.

CALIFORNIA CIVIL CODE SECTION 1390.2 (Deering)

PROPERTY COVERED BY SPECIAL POWER AS SUBJECT TO CLAIMS OF CREDITORS.

Property covered by a special power of appointment is not subject to the claims of creditors of the donee or of his estate or to the expenses of the administration of his estate.

MOTION FILED
FEB 5 1988

5

No. 87-1132

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118, AND THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Petitioners,
v.
SANTA BARBARA FOUNDATION,
Respondent.

**On Petition for Writ of Certiorari
to the Ohio Supreme Court**

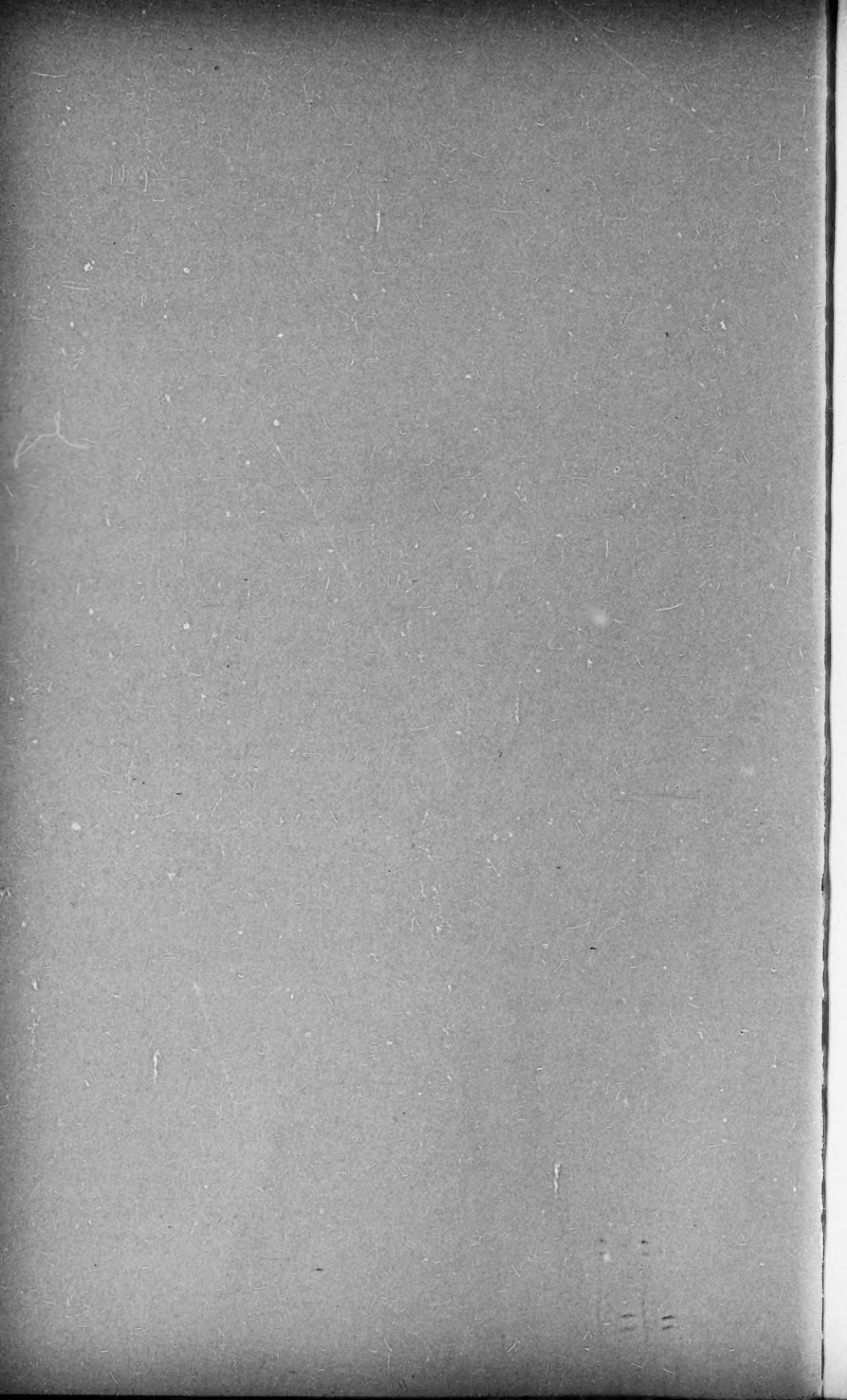
**MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF
OF THE AMERICAN BANKERS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF PETITION**

JOHN J. GILL III
*General Counsel
Counsel of Record*

MICHAEL F. CROTTY
Associate General Counsel-Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

February 5, 1988



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-1132

THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4118, AND THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST NO. 4117,
Petitioners,

v.

SANTA BARBARA FOUNDATION,
Respondent.

**On Petition for Writ of Certiorari
to the Ohio Supreme Court**

**MOTION FOR LEAVE TO FILE A BRIEF
OF THE AMERICAN BANKERS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF PETITION**

In accordance with the provisions of Rule 36 of the Supreme Court Rules, the American Bankers Association hereby respectfully moves the Court for leave to file the attached brief as amicus curiae in support of the petition. The Petitioners have consented to the filing of this brief; the Respondent has not replied to a request for its consent.

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. There are member banks of the American Bankers Association in each of the fifty states and the District of Columbia, approximately four thousand of which have and exercise trust powers. As more fully shown in the attached Brief as Amicus Curiae, it is entirely customary for bank trustees to administer trusts where a significant percentage of the income beneficiaries are located outside the state in which the bank does business. It is exceptionally impractical and uneconomical for trustees to carry out their fiduciary duties to trusts, settlors and beneficiaries if the trustees can be haled into court anywhere in the country or, for that matter, in the world, in litigation over the disposition of trust assets. Accordingly, it is of critical importance to the industry that the due process rights of trustees be protected against judgments which exceed the scope of local courts' jurisdiction. The fact that this Court has recognized this fundamental principal time and again has provided no relief thus far in this case. The American Bankers Association, as the representative of the industry most affected by the outcome of this litigation, therefore respectfully urges the Court to receive the attached brief as amicus

curiae for a presentation of the views of the banking industry on this matter.

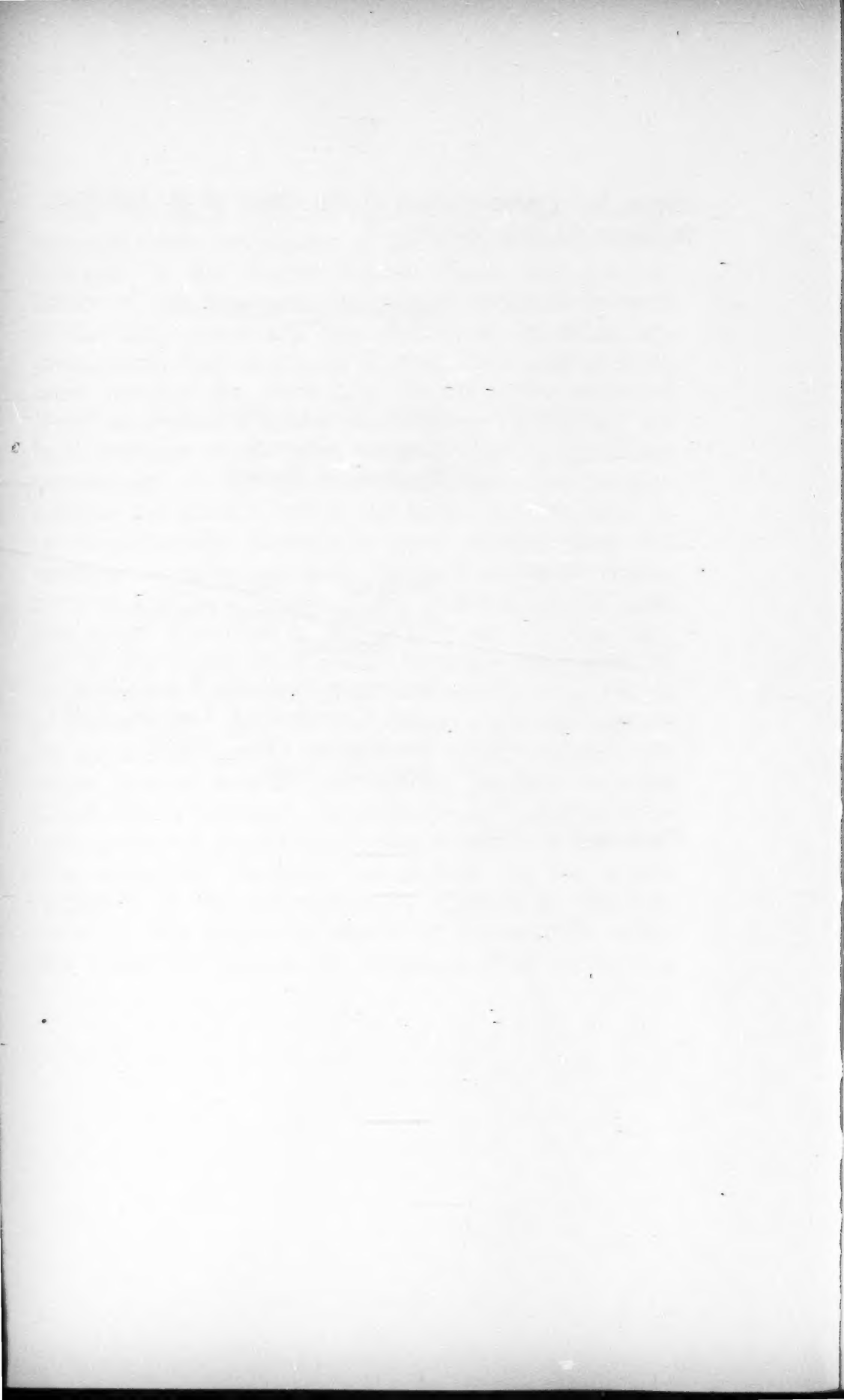
Respectfully submitted,

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Associate General Counsel-
Litigation

American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

February 5, 1988



QUESTION PRESENTED FOR REVIEW

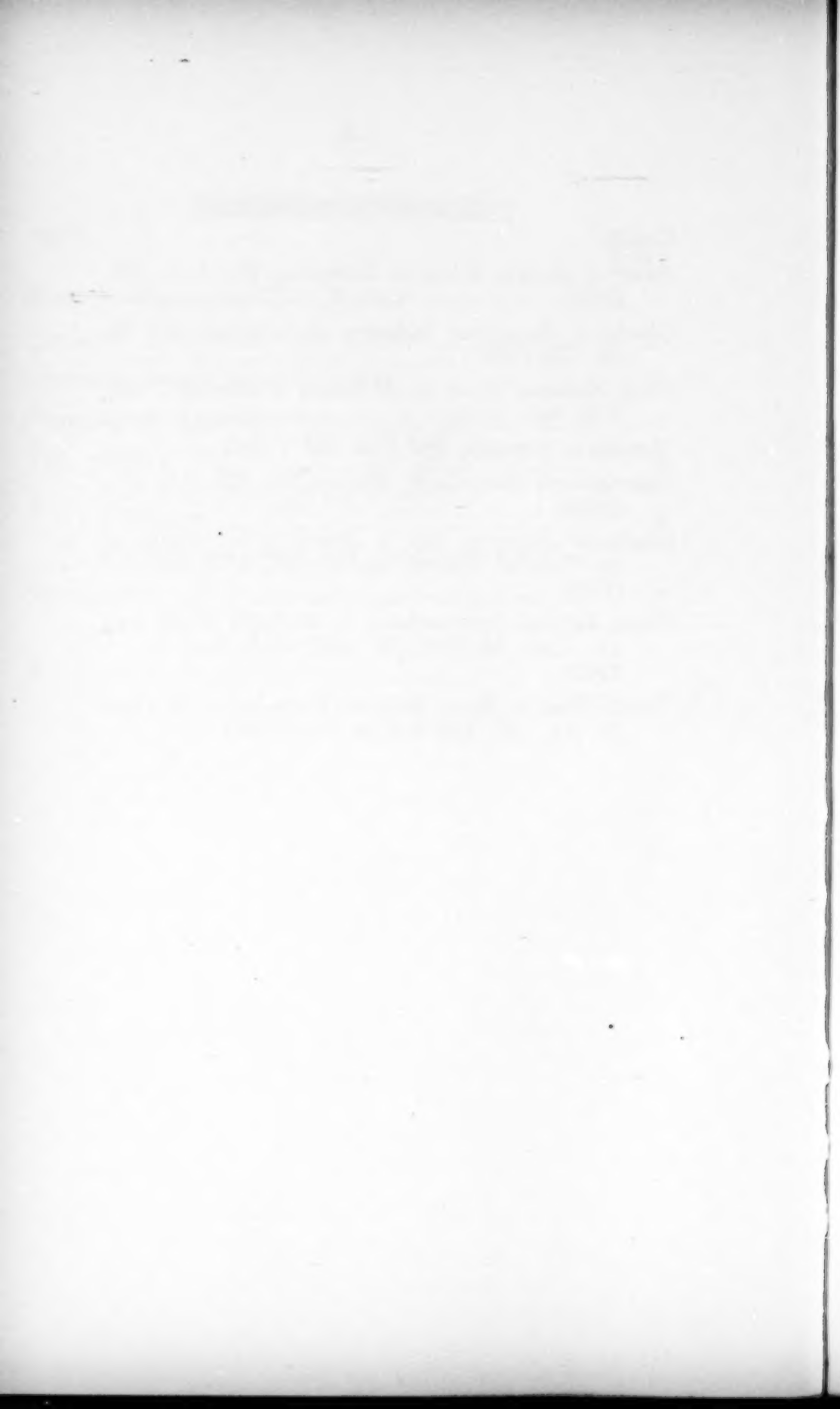
Whether petitioners, who are, respectively, an Ohio beneficiary claimant of trust property, and the Ohio trustee holding and administering such property, were denied due process of law by a judgment of the Ohio Supreme Court giving preclusive effect, as a matter of full faith and credit, to an order of a California court awarding the property and directing its distribution to another claimant, in a proceeding in which petitioners did not appear, and in which jurisdiction over them was asserted by mere notice of such proceeding?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. PERSONAL JURISDICTION OVER THE TRUSTEE	6
II. JURISDICTION OVER THE TRUST ASSETS	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
<i>Baker v. Baker, Eccles & Company</i> , 242 U.S. 394 (1917)	6
<i>Clarke v. Securities Industry Association</i> , 107 S. Ct. 750 (1987)	3
<i>First National Bank in St. Louis v. Missouri</i> , 263 U.S. 640 (1924)	2
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958)	7, 9
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	6
<i>Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System</i> , 472 U.S. 159 (1985)	3
<i>Omni Capital International v. Rudolph Wolff and Co., Ltd.</i> , 56 U.S.L.W. 4031 (U.S. Dec. 8, 1987)	6
<i>Toledo Trust v. Santa Barbara Foundation</i> , 32 Ohio St. 3d. 141, 512 N.E.2d 664 (1987)	7



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-1132

THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4118, AND THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST NO. 4117,
Petitioners,
v.
SANTA BARBARA FOUNDATION,
Respondent.

**On Petition for Writ of Certiorari
to the Ohio Supreme Court**

**BRIEF OF THE AMERICAN BANKERS ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITION**

The American Bankers Association respectfully submits this brief as amicus curiae to urge the Court to grant the petition for writ of certiorari in order to review a decision of the Ohio Supreme Court. In that decision, the court gave "full faith and credit" to a decision of a California probate court which purported to bind an out-of-state trust and trustee, and to fix certain property rights even though the California court lacked jurisdiction over the trust and trustee. In doing so, the Ohio Supreme Court placed itself at

odds with controlling precedent laid down by this Court, and has denied due process of law to the trust and trustees.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. Its members are located in each of the fifty states and the District of Columbia and include banks chartered by the United States ("national banks") and those chartered by their respective states ("state banks"). Approximately 4,000 commercial banks in the United States possess and exercise trust powers under applicable federal and state law.

Perhaps more than most industries, banking in the United States is a local business. Historically, various state and federal laws have seriously constrained the ability of banks to open business locations other than their main offices. In many states, so-called "unit banking" states, there has been a flat prohibition against any branch offices of banks. Other states permit limited or statewide branching of banks. National banks are bound by state branching laws by virtue of the McFadden Act (12 U.S.C. § 36) and, in point of fact, until that law was enacted in 1927, national banks were not authorized to have branch offices at all. *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

It is only in this decade, two centuries after the founding of the nation, that banking organizations are beginning to transcend state borders in any meaningful fashion, through state legislation which permits bank holding companies from other states to operate

within the legislating state under certain conditions (*See Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985)) or through the opening of out-of-state offices dedicated to the performance of limited functions, rather than the full panoply of banking services (*See Clarke v. Securities Industry Association*, 107 S. Ct. 750 (1987)).

While these developments are well-publicized and involve some of the major banking organizations in the country, the fact remains that the overwhelming majority of banks have not expanded their geographic presence beyond traditional limits.

But if banks are essentially immobile, the customers they serve are not. This case is a good example of the point. In 1960, Nancy Jones, of Ohio, went to her local bank, Toledo Trust, to create two inter vivos trusts in favor of her daughters. Toledo Trust remained in Ohio, but Nancy Jones and her daughter did not. Mrs. Jones now maintains residences in Nevada and California, and her daughter, Marcia Rivas, died a resident of California. Toledo Trust did not intentionally seek out the business of Californians in this case, but unwittingly found itself doing business with Californians anyway. Member banks of the American Bankers Association have reported to us informally that anywhere from ten percent to fifty percent of the income beneficiaries of trusts which they administer are located outside of the state in which the reporting bank does business.

In this case, the trust in favor of Marcia Rivas gave her the power to appoint, by will, successor recipients of the assets of the trust upon her death. In default of a testamentary appointment, the proceeds of the

Rivas trust were to be paid to the trust simultaneously established in favor of Mrs. Jones' other daughter, Roberta Pawlak. Mrs. Rivas attempted to exercise her power of appointment to designate Alcoholics Anonymous as recipient of ten percent of the assets of the trust. Alcoholics Anonymous declined to accept more than \$500.

The Santa Barbara Foundation then laid claim to the assets, invoking the cy pres doctrine, and after a hearing, the probate court in Santa Barbara awarded the assets to the Foundation. It is at least arguable that Mrs. Rivas' unsuccessful attempt to bestow assets upon Alcoholics Anonymous constituted a default in the exercise of her power of appointment, in which event the Pawlak trust would have been the recipient of the ineffectively appointed assets. The Court of Common Pleas of Lucas County, Ohio, and the Ohio Court of Appeals so held. But whether those courts were correct or not is not the point. The critical point here is that the Santa Barbara probate court extinguished any claim, any property right, the Pawlak trust might have had to the Rivas trust assets without ever having established jurisdiction over the trusts or the trustee and without ever having had the cy pres claim of the Foundation undergo an adversarial proceeding. To this patently unjust disposition, the Ohio Supreme Court gave full faith and credit. If the decision stands, and becomes precedent elsewhere, it will sanction similar outcomes in the future, and will compel bank trustees, doing business in discrete locations to stand ready to represent their trusts in far-flung, unfamiliar and unanticipated jurisdictions. That is impractical and uneconomical both from the point of view of the bank and the settlors and

beneficiaries of trusts. Moreover it is a denial of due process of law to trusts and trustees outside the jurisdiction of the courts claiming the ability to render dispositive judgments.

SUMMARY OF THE ARGUMENT

This is a case in which the Ohio Supreme Court has decided an important question of federal constitutional law in a way in conflict with applicable decisions of this Court, both with respect to its determination of the personal jurisdiction issue and with respect to the issue of jurisdiction over the trust assets. Mere "notice" that certain proceedings are under way in an out-of-state forum is constitutionally insufficient to establish jurisdiction over the trustee. In addition, the necessary, but unstated, assumption that the trust assets were assets of the estate, subject to jurisdiction of California probate courts, is an erroneous one.

ARGUMENT

I. PERSONAL JURISDICTION OVER THE TRUSTEE

There is no question in this case that the trustee, Toledo Trust Co., received a notice that the Santa Barbara Foundation had filed a "Petition for Determination of Entitlement to Distribution of the Estate" in the California courts, and that a hearing would be held on the matter. The notice stated that "[t]his notice is required by law. This notice does not require you to appear in court but you may attend the hearing if you wish." (A86-87)

The Constitution requires more in order for a court to bring a party within its jurisdiction. Such a "no-

tice" without more, "is a futile attempt to extend the authority and control of a State beyond its own territory." *Baker v. Baker, Eccles & Company*, 242 U.S. 394, 403 (1917).

Indeed, as this Court has held, just this term,

before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Omni Capital International v. Rudolph Wolff and Co., Ltd., 56 U.S.L.W. 4031, 4033 (U.S. Dec. 8, 1987).

In this case, of course, there was no summons, no consent, and no constitutionally sufficient relationship between the trustee and the State of California. As a nonresident, Toledo Trust becomes subject to jurisdiction of California courts if, and only if, it has "certain minimum contracts with [California] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

The concept of minimum contacts, in turn can be seen to perform two related, but distinguishable functions. It protects the defendant against the burdens of litigating in an inconvenient forum. And it acts to ensure that states do not reach out beyond limits in a federal system, *World-*

Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-292 (1980).

Volumes could be written on what does and does not rise to the level of "minimum contacts," but we need not detail those considerations here. Toledo Trust has no contacts with California, none are apparent in the records of this case, and none are alleged. It is only the presence in California of the estate of a deceased income beneficiary of the trust which gives even a colorable claim to jurisdiction by California courts.

Yet in *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court made it perfectly clear that a trust and trustee located in one state were not subject to jurisdiction in another state simply because a will was probated in the second state, and that will purported to claim the trust assets as an asset of the estate. The facts in this case are virtually identical and the result should be the same.

II. JURISDICTION OVER THE TRUST ASSETS

Hanson disallowed assertion of jurisdiction over out-of-state trust assets. In the case of Marcia Rivas, what was at issue was a decedent's *estate's* assets, which were properly subject to jurisdiction of a probate court in the decedent's domicile at the time of death: "The decision of the California court merely sought to ascertain and give effect to the *testamentary* intent of a California domiciliary, *Toledo Trust v. Santa Barbara Foundation*, 32 Ohio St. 3d. 141, 146, 512 N.E.2d 664, 668 (1987) (emphasis supplied).

This is the fatal flaw in the reasoning of the Ohio Supreme Court, for in point of fact, the *testamentary* intent of Marcia Rivas is not relevant to anything.

The trust assets, legally owned by Toledo Trust and located in Ohio, did not pass to the various designated charitable organizations under and by virtue of Rivas' will *as such*. Rather, the assets passed in accordance with the terms *of the trust*. Rivas' will was merely the prescribed medium for the exercise of a power of appointment. The trust could just as easily have directed that the power of appointment be exercised by writing in longhand on the back of an envelope. Mrs. Rivas could not very well have bequeathed that which she did not own, and she never *owned* the trust's *assets*. Those were assigned, transferred, conveyed and delivered to the Toledo Trust Company and held by the Toledo Trust Company. Mrs. Rivas was the beneficiary of "such part of the income and/or principal as [Toledo Trust in *its* discretion] deems necessary, advisable or expedient" to pay to her from time to time (Trust Agreement, Article II, Section 1).

The Trust Agreement goes on to provide explicitly that Mrs. Rivas had the power of appointment to dispose of the trust assets at the time of her death, but that "such power of appointment shall not be exercisable in favor of the Donor's (Ms. Jones) said daughter (Mrs. Rivas), *her estate*, her creditors or the creditors of her estate." (Trust Agreement, Article II, Section 2) (emphasis supplied).

By its very terms, therefore, the Trust Agreement prevents the *assets* of the trust from becoming part of the Rivas *estate*, and therefore those *assets* cannot become subject to probate. But it is only the assets of the *estate* which are within the jurisdiction of the California courts. It is the trust agreement, and the intent of the Donor of the trust (Ms. Jones) which dictate the disposition of the trust assets, not the Last

Will and Testament of Marcia Rivas or the intent of the Testatrix.

This case is not any different from *Hanson v. Denckla* where, like here, there was an attempt to exercise a *testamentary* power of appointment in one state governing the assets of a trust in another state. The court of the state in which the testamentary disposition was attempted was held, by this Court, to lack jurisdiction:

The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called "in rem" jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of the inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the state nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. . . . In analogous cases, this Court has rejected the suggestion that the probate decree of the State where a decedent was domiciled has an in rem effect on personalty outside the forum state that could render it conclusive on the in-

terests of non-residents over whom there was no personal jurisdiction. (citations omitted). The fact that the owner is or was domiciled within the forum state is not a sufficient affiliation with the property upon which to base jurisdiction in rem.

(*Id.*, 357 U.S. at 247-249).

The Ohio Supreme Court's efforts to distinguish *Hanson v. Denckla* must therefore fail.

CONCLUSION

For all of the reasons stated herein, the amicus curiae American Bankers Association respectfully urges that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Associate General Counsel-
Litigation

Attorneys for Amicus Curiae
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

February 5, 1988

No. 87-1132

6

FILED

FEB 25 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST
NO. 4118 AND THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,

Petitioners,

vs.

SANTA BARBARA FOUNDATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITIONER TRUST NO. 4118's REPLY BRIEF

E. THOMAS MAGUIRE

Counsel of Record

MICHAEL S. MESSENGER

ROBISON, CURPHEY & O'CONNELL

Four SeaGate, 9th Floor

Toledo, Ohio 43604

(419) 249-7900

Attorneys for Petitioner

The Toledo Trust Company,

as Trustee of Trust No. 4118

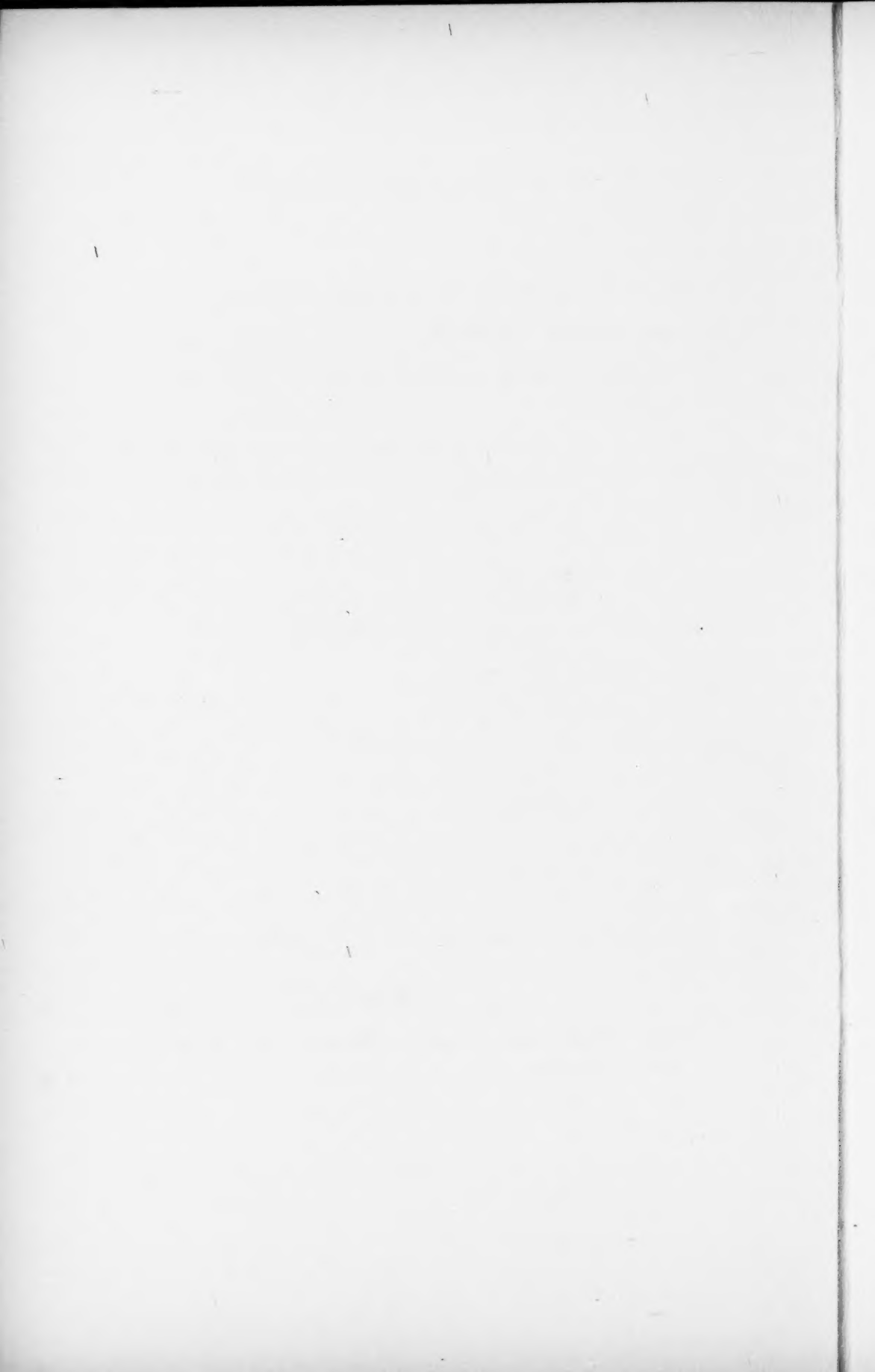


TABLE OF CONTENTS

Petitioner Trust No. 4118's Reply Brief	1
Supplemental Appendix:	
Supreme Court of Ohio Rules of Practice, Rule V(1)(D)	A1
Brief of Appellant Santa Barbara Foundation Filed in the Supreme Court of Ohio (Excerpt) ..	A2
Reply Brief of Appellant Santa Barbara Foundation Filed in the Supreme Court of Ohio (Excerpt)	A4

TABLE OF AUTHORITIES

Cases

<i>Brinkerhoff-Faris Trust & Savings Co. v. Hill</i> , 281 U.S. 673 (1930)	2
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958)	4
<i>Herndon v. Georgia</i> , 295 U.S. 441 (1935)	2
<i>Missouri v. Gehner</i> , 281 U.S. 276 (1930)	2

Rule

Ohio Supreme Court Rules of Practice, Rule V(1)(D)	3
---	---



No. 87-1132

IN THE

Supreme Court of the United States

October Term, 1987

**THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4118 AND THE TOLEDO
TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4117,
*Petitioners,***

vs.

**SANTA BARBARA FOUNDATION,
*Respondent.***

**ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

**PETITIONER TRUST NO. 4118's
REPLY BRIEF**

Contrary to Respondent's assertion, Petitioner's federal due process rights were first denied by the Ohio Supreme Court at the ultimate stage of the proceedings below. That order could not have been anticipated because Respondent had expressly disclaimed any intention of raising the issue decided. Thus, by joining in

the motion for rehearing, this Petitioner invoked its federal constitutional claim at the "earliest opportunity for raising it," *Herndon v. Georgia*, 295 U.S. 441, 444 (1935); and despite the Ohio Supreme Court's denial of the motion without opinion, that claim was sufficiently and timely raised. *Missouri v. Gehner*, 281 U.S. 276, 320 (1930); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-8 (1930).

Here the question of "effective exercise" of the special power of appointment required construction of both the instrument of grant (the Ohio trust agreement) and the instrument of exercise (the California will). Before the Ohio courts, all that Respondent claimed as to the "full faith and credit" effect of the California court's order was that it is conclusive as to *will* construction. Summarizing that claim in its reply brief on the merits in the Ohio Supreme Court, Respondent said:

"The California proceedings did not purport to exercise jurisdiction over the trust assets, the trustee or the takers in default, nor did it [sic] attempt to construe or interpret the trust instrument." (Suppl. A5).

But, in view of the declination by Alcoholics Anonymous, and despite the judicial substitution of Respondent, the Ohio trial court perceived the "threshold issue" to be whether the donee of the power had "... fail[ed] effectively to exercise the power of appointment granted to her ..." within the meaning of these words of the *trust* agreement, and the court of appeals affirmed. Neither lower court found Respondent's full faith and credit argument relevant, much less dispositive.

In Ohio Supreme Court practice, the appellant is required to frame issues on appeal as "proposition[s] of law which the appellant claims is applicable to the facts in the case and which, if he prevails, could serve as a syllabus." (Ohio Supreme Court Rules of Practice, Rule V(1)(D), Suppl. A1). But the Respondent's "propositions" in its Ohio Supreme Court brief neither raised nor even mentioned the California order (Suppl. A3).

The Ohio Supreme Court's order in this case thus came as a surprise to the parties, *none* of whom had contended that the California order was decisive as to all questions affecting entitlement to the trust assets—decisive, that is, as to trust as well as will construction, and binding on parties who had not appeared in California, and over whom, as Respondent had conceded, the California court "did not purport to exercise jurisdiction."

Petitioner Trustee of Trust No. 4117 then filed a motion for rehearing (Respondent's A16), seeking clarification as to whether the Ohio Supreme Court had indeed meant to award the trust assets to Respondent by giving the California order "full faith and credit" effect as to all entitlement questions.* Joining in that motion, Petitioner herein noted that the decisive effect the Ohio Supreme Court apparently had given the California order had not been a matter of "genuine contention," and was "squarely at odds with the constitutional principles of due process and full faith and

* The Ohio Supreme Court subsequently acted to dispel any doubt about that meaning. The common pleas court's November 19, 1987 order on remand (A30), directing distribution of the assets to the Respondent, was entered in response to a peremptory writ of mandamus which the Ohio Supreme Court had issued at the Respondent's instance.

credit announced by the United States Supreme Court in *Hanson v. Denckla* . . ." This Petitioner then proceeded in its memorandum to argue those principles, essentially as it has done here (Respondent's A20-25). Thus, it can not seriously be maintained that this Petitioner failed to raise the constitutional issue at the earliest opportunity below.

Respectfully submitted,

E. THOMAS MAGUIRE
Counsel of Record

MICHAEL S. MESSENGER
ROBISON, CURPHEY & O'CONNELL
Four SeaGate, 9th Floor
Toledo, Ohio 43604
(419) 249-7900

*Attorneys for Petitioner
The Toledo Trust Company,
as Trustee of Trust No. 4118*

SUPPLEMENTAL APPENDIX

**SUPREME COURT [OF OHIO] RULES
RULES OF PRACTICE**

* * * * *

RULE V. BRIEFS ON MERITS IN APPEAL CASES

Section 1. Appellant's Brief

* * * * *

The appellant's brief must comply with Rule VI and contain.

* * * * *

(D) An argument, which shall be headed by the proposition of the law which the appellant contends is applicable to the facts in the case and which, if he prevails, could serve as a syllabus. See paragraph three of the syllabus of *Drake v. Bucher*, Supt. (1966), 5 Ohio St.2d 37, 213 N.E.2d 182. If several propositions of law are contended for, the argument shall be divided by utilizing each proposition as a subheading.

A2

**BRIEF OF APPELLANT SANTA BARBARA
FOUNDATION FILED IN THE SUPREME
COURT OF OHIO (EXCERPT)**

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117,

Appellee,

vs.

SANTA BARBARA FOUNDATION,

Appellant,

and

THE TOLEDO TRUST COMPANY AS
TRUSTEE OF TRUST NO. 4118,

AND NANCY S. JONES,

Appellees.

Appeal from the Judgment of the Court
of Appeals of Lucas County, Ohio
Sixth Appellate District

**BRIEF OF APPELLANT SANTA
BARBARA FOUNDATION**

* * * * *

Proposition of Law No. 1:

The declination of appointive assets by a designated appointee does not render the exercise of a testamentary special power of appointment ineffective.

* * * * *

Proposition of Law No. 2:

Equitable principles may be applied to give effect to an attempted exercise of a testamentary special power of appointment where the donee of such power expresses an intent to execute the power by will and designates various charitable institutions as appointees [*Wills v. Union Savings & Trust* (1982), 69 Ohio St. 2d 382, affirmed].

A4

REPLY BRIEF OF APPELLANT SANTA
BARBARA FOUNDATION FILED IN THE
SUPREME COURT OF OHIO (EXCERPT)

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117,

Appellee,

vs.

SANTA BARBARA FOUNDATION,

Appellant,

and

THE TOLEDO TRUST COMPANY AS
TRUSTEE OF TRUST NO. 4118,

AND NANCY S. JONES,

Appellees.

Appeal from the Judgment of the Court
of Appeals of Lucas County, Ohio
Sixth Appellate District

REPLY BRIEF OF APPELLANT
SANTA BARBARA FOUNDATION

* * * * *

For the same reason that the judgment of the
Michigan court [in *Toledo Trust Co. v. National Bank of
Detroit*, 50 Ohio App. 2d 147 (1976)] as to the

guardianship itself was entitled to full faith and credit in *Toledo Trust*, the order of the California court in this instant action is likewise entitled to full faith and credit. The California proceedings did not purport to exercise jurisdiction over the trust assets, the trustee or the takers in default, nor did it attempt to construe or interpret the trust instrument. As has been previously stated, the California action was a construction action conducted to ascertain the intention of a California domiciliary, for which action California was the only proper forum. [p. 12]

* * * * *